Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208
	)	
Accipiter Communications Inc. Petition for Waiver of the Commission's Rules Implementing Reform of Universal Service Support	)	

REPLY TO OPPOSITION TO PETITION FOR TEMPORARY WAIVER

Accipiter Communications Inc. ("Accipiter"), pursuant to the Public Notice issued by the Wireline Competition Bureau in the above-referenced dockets,[1] hereby replies to the Opposition to Petition for Waiver submitted by Cox Communications, Inc. ("Cox") on June 5, 2012 ("Cox Opposition").[2] Accipiter sought a temporary waiver to continue the robust growth that would allow the company to avoid potentially serious consequences of the transition to the regression and per-line caps on universal service funding. This additional time was needed because, among other things, Accipiter's initial entry into the market was delayed by an anticompetitive arrangement. The primary focus of Cox's opposition is an attack on Accipiter's characterization of the parties' past history in the Vistancia development. The only reason Accipiter brings this history up is to demonstrate that Accipiter was handicapped in its initial growth by the

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[1] Wireline Competition Bureau Seeks Comment on Accipiter Communications, Inc. Petition for Temporary Waiver of Certain High-Cost Universal Service Rules, *Public Notice*, WC Docket No. 10-90, WT Docket No. 10-208, DA 12-712 (rel. May 4, 2012).

[2] The National Telecommunications Cooperative Association ("NTCA") filed Comments supporting the grant of Accipiter's Petition for Waiver on June 5, 2012, noting that Accipiter had provided detailed evidence in support of its petition and that Accipiter's petition raised concerns similar to those raised by both NTCA and other carriers.

anticompetitive actions of Cox and the developer. But for the existence of the anticompetitive arrangement that hampered Accipiter's entry into the market, Accipiter would likely not be requesting a waiver at all.[3] As it stands, Accipiter requires a waiver to allow it to survive the transition to the Commission's new rules, continue to grow, and grow its way out of the line caps. In fact, if Accipiter is merely allowed to use its current line count in the calculation of the cap, rather than being forced to use outdated data, Accipiter can survive the effects of the cap.

I. THE FACTS SURROUNDING THE VISTANCIA DEVELOPMENT SPEAK FOR THEMSELVES.

Cox begins its Opposition by stating that, "Accipiter's petition relies heavily on its inaccurate account of the facts involving Accipiter's efforts to provide service in Vistancia, a subdivision in Peoria, Arizona."[4] In its Opposition, however, Cox does not actually point to any particular facts alleged by Accipiter that are inaccurate. While Accipiter understands that the facts are certainly inconvenient for Cox, that does not mean that Accipiter's characterization of the history between the parties is in any way inaccurate or irrelevant.

To avoid any confusion or uncertainty concerning the facts, Accipiter attaches two exhibits. First, Accipiter attaches a newspaper article describing the complaint against Cox , Cox's own internal descriptions of the arrangement, and the terms of the settlement.[5] Second, Accipiter attaches testimony of the staff of the Arizona Corporation Commission Utilities Division that was submitted in the complaint proceeding before the Arizona Corporation

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[3] The principal cause of Accipiter's failure to develop economies of scale sufficient to avoid the effect of the Commission's caps earlier was the effect of the anticompetitive preferred provider arrangement.

[4] Cox Opposition at 1.

[5] Exhibit 1.

Commission concerning Cox's exclusive service arrangement with the Vistancia developer. That testimony reflects the staff's belief that "the arrangement was both discriminatory and anti-competitive," and recommended that "Cox be fined a flat amount of $2 million under A.R.S. 40-424."[6] The staff stated that, "once presented with the private easement concept by Shea, Cox actively participated in drafting the agreements to ensure a discriminatory and anti-competitive result."[7] Further, according to the staff, "Hand written notes by Cox employees contained on pages C01853 and C01769 of Cox's response to Accipiter's data requests indicate that the intent of the discriminatory license fee was to keep competitors out of the Vistancia development."[8] Contrary to Cox's claim, Accipiter has no need to distort or misstate the facts. The facts speak for themselves.

While Cox is correct that the parties entered into a settlement agreement, Cox's conclusions regarding the implications of that settlement agreement for Accipiter's waiver request are puzzling. Cox claims that there is "no evidence at all that anything Cox has done in the overlapping service territory has had any impact on Accipiter's need for universal service."[9] To the extent Accipiter's Petition was somehow unclear on this point, Accipiter welcomes the opportunity to clarify this matter. Accipiter's point is that because of anticompetitive action by

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[6] Exhibit 2 at 4. Cox notes that, in an earlier proceeding, Accipiter alleged that Cox had been fined $2 million by the Arizona Corporation Commission in connection with Accipiter's complaint. Cox Opposition at 3, fn. 5. In fact, Accipiter subsequently clarified that the staff of the Arizona Corporation Commission proposed a $2 million fine, the proposal has not been acted upon by the Commission and, that the docket remains open at this time. *See* Accipiter Reply to Opposition to Application for Review, 9, CC Docket No. 96-45 (filed March 15, 2011).

[7] *Id.* at 9.

[8] *Id.* at 10.

[9] Cox Opposition at 4.

Cox, Accipiter experienced delays in achieving the economies of scale which will ultimately obviate the need for a waiver[10]. This action only ceased following legal action instituted by Accipiter as well as a proceeding instituted by the Arizona Corporation Commission and an investigation the United States Department of Justice.

Cox claims, "Accipiter has chosen to focus its efforts on seeking to obtain additional benefits and subsidies from the Commission, rather than on competing in the marketplace or even taking advantage of the opportunities it was provided under the settlement with Cox."[11] This is both a grossly unfair and incorrect characterization and a transparent effort to confuse two distinct issues. The facts set forth in the attached testimony of the Arizona Corporation Commission staff show that it was Cox, not Accipiter, that sought to avoid competition in Vistancia, and it is remarkable that Cox now has the temerity to trumpet the virtues of competition. Further, as Cox acknowledges in a footnote, Accipiter *does not receive high cost support* for its service in a significant portion of Vistancia, where Accipiter competes with Cox.[12]

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[10] The presence of the anticompetitive agreement and subsequent legal battle which resulted in the settlement agreement provided Cox with a three-year headstart in network construction, marketing and installation for homes in the development.

[11] *Id.*

[12] *Id.*, fn. 8. Cox cites Accipiter's Application for Review of the Wireline Competition Bureau's denial of a study area waiver which included over half of the existing Vistancia development. As Accipiter has previously informed the Commission: "The Bureau's denial of the study area waiver petition does not have a rational basis from this perspective. If allowed to stand, the Order will frustrate the Commission's announced policies for reform of the Universal Service support mechanisms by denying Accipiter the opportunity to reduce its average costs and gain efficiency and economy of scale. Accipiter estimates that had the Bureau granted its waiver within a year of the time it was filed, its support level today would be substantially below the Commission's proposed $3,000 cap per access line and would decline further in future years if Vistancia continues to grow. Reduction in Accipiter's USF support would benefit all USF contributors. The rural customers that depend on Accipiter as their only telecommunications provider would also benefit." Accipiter Communications Inc. Reply to Opposition to Application for Review, 5-6, CC Docket 96-45 (March 15, 2011).

Accipiter went to great lengths to ensure its ability to compete in Vistancia and is actively competing with Cox there, despite Cox's apparent earlier efforts to prevent such competition.

Finally, Cox's dismissive characterization of high cost support as mere "benefits and subsidies" reflects Cox's position in the market as a service provider that has made a conscious choice to offer service only in those higher density areas where service can be provided profitably while eschewing low density rural areas that lack service. That is, of course, Cox's choice. But in making that choice, Cox's approach stands in stark contrast to the efforts of carriers like Accipiter that rely on high cost support to provide service to millions of Americans living in rural America. Those carriers have made a different choice than Cox. They have chosen to provide service to Americans living in rural areas where service cannot be provided economically without high cost support, or what Cox dismisses as "benefits and subsidies."[13]

II. COX PROVIDES NO VALID BASIS FOR DENYING ACCIPITER'S PETITION.

Setting aside Cox's unsupported and vague assertions that Accipiter has somehow distorted the clear facts of the parties' history with respect to the Vistancia development, Cox makes a troubling series of unsupported leaps of logic in asserting, without specific support, that Accipiter has not met its burden in its waiver petition. In adopting its reforms to universal service support and intercarrier compensation, the Commission expressly contemplated waivers

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[13] Cox largely confines its Opposition to a discussion of the Vistancia development. In fact, Cox has preferred provider arrangements in two other developments in Accipiter's study area (Festival Ranch-Sun City and Bell Pointe). Cox states that suburban density areas do not need support (Cox Opposition at 5), yet fails to address why Cox continues to participate in agreements which appear intended to limit or prevent competition. Indeed, Cox chooses to "cherry-pick" suburban densities in Accipiter's study area and enter into preferred provider arrangements to thwart competition while refusing to leverage Cox's own economies of scale to serve the outlying rural establishments in Accipiter's study area.

where there was a risk that customers could lose service if existing levels of high-cost support were reduced:

> "As a safeguard to protect consumers, we provide for an explicit waiver mechanism under which a carrier can seek relief from some or all of our reforms if the carrier can demonstrate that the reduction in existing high-cost support would put consumers at risk of losing voice service, with no alternative terrestrial providers available to provide voice telephony."[14]

That is a straightforward standard that allows the Commission the flexibility to grant a waiver where a carrier can show that, absent a waiver, there is a risk that consumers will lose service due to the carrier's reduction in high-cost support.

Cox attempts to distort this standard by claiming that, "to demonstrate that a waiver is necessary, Accipiter would need to show that it is unable to survive losses that would be caused by the cap for" the period until Accipiter's growth reduces its per-line costs below the per-line caps.[15] That is *not* the standard the Commission set forth. Indeed, to hold Accipiter or any carrier to a standard of demonstrating that, absent a waiver, there is no doubt at all that the company will perish would be to take a considerable risk that a carrier would miscalculate the impact of the new rules, particularly given the uncertainty that surrounds the effect of the new rules. Accipiter specifically noted in its Petition for Waiver that it was not possible to compute precisely the effect of the new rules on Accipiter. The release of the Wireline Competition Bureau's Order implementing the specific methodology has not fully clarified the situation, and that order itself is subject to multiple applications for review. Accipiter thus cannot precisely predict what the final result will be in terms of the financial impact of the imposition of the new

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[14] Connect America Fund, *Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 10-90, FCC 11-161 at ¶ 32.

[15] Cox Opposition at 5.

rules. Nevertheless, in the absence of the necessary clarification, Accipiter attempted to calculate the effect of the rules on Accipiter based upon its own assumptions and the provisions of the rules as they stood when Accipiter submitted its Petition – specifically seeking a temporary waiver which will minimize the impact of USF changes until six months following the time when the formulas authorized by the rules are finally clarified, and potentially seeking a further temporary waiver if necessary, and seeking a temporary waiver until 2014 or 2015 of the per-line cap.[16] As discussed in greater detail below, the waiver that Accipiter requires immediately is now quite limited.

Even if the Commission's waiver standard required a carrier to demonstrate that, absent a waiver, imposition of the new rules would represent a death sentence for the carrier, which it does not, it is unclear how Cox can possibly claim to know that Accipiter failed to make such a showing and Cox has not provided substantive support for its claim.[17]

Similarly, Cox's assertion that Accipiter has failed to demonstrate that imposition of the rules without a waiver would represent an unconstitutional taking is totally unsupported. In fact, Accipiter's financial forecasts demonstrate that immediate application of the new rules without a waiver will have dire financial implications for Accipiter that threaten the company's ability to continue to provide service – including in areas where there are no alternate service providers. Accipiter has thus demonstrated, to the best of its ability given the ongoing uncertainty surrounding the new rules, all that it needs to demonstrate to justify a waiver, and the Commission should not entertain Cox's implicit revision of the waiver standard.

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[16] Accipiter Petition for Temporary Waiver at 1-2.

[17] *Id.*, Exhibits 5 and 6.

In contrast to Cox's wholly speculative claims regarding Accipiter's financial situation, Accipiter presents the following information regarding its need for a waiver. If the Commission does not grant Accipiter the limited waiver discussed in greater detail below, Accipiter believes there is a substantial possibility that it will default on its RUS loans. Cox's suggestion that Accipiter would merely be required to submit a recovery plan is entirely misinformed – the fact is that Accipiter has already submitted a recovery plan, which it is in now, and, absent a waiver, Accipiter could be unable to meet the financial terms on which its recovery plan was based. *Further, Accipiter will likely be insolvent and unable to continue to provide service, which will result in a loss of service for customers who have no alternative service provider.*

Cox next claims that "Accipiter neglects to inform the Commission that its own state tariff permits it to charge customers to extend lines when the cost of the line extension exceeds seven times the annualized local service charge," implying that Accipiter is thus free to recover costs from its customers.[18] There are two fundamental problems with Cox's assertion. First, whether or not Accipiter is "permitted" to attempt to recover costs from its customers has nothing to do with whether those customers are able to pay Accipiter's costs for extending lines to provide service. It is a gross oversimplification to suggest that Accipiter can simply recover its costs from its customers. There is a limit to what customers can and will pay, and Cox's approach would represent a serious barrier to extending service in unserved areas. Second, because RUS recognizes this problem, provisions in RUS's loan covenants prohibit Accipiter from assessing line extension charges in many cases.

Further, Cox's implicit argument that the fact that the waiver Accipiter seeks is temporary somehow justifies not providing a waiver at all is unavailing. Cox correctly notes that

[18] Cox Opposition at 7.

Accipiter's petition seeks a temporary waiver, and that Accipiter projects it will be affected by the $250 per-line cap for a limited period of time.[19] However, Cox goes on to make an unsupported logical leap that Accipiter can just hang on and wait for growth in the face of diminished high-cost support. This is a completely unsupported conclusion. Moreover, what Cox fails to recognize is that the fact that Accipiter only requires a temporary waiver is a *good thing* that actually supports grant of a waiver. It means that Accipiter's waiver will still comport with the Commission's long-term policy goal to limit high-cost support, while allowing Accipiter to continue to provide service in areas where there are no alternate service providers. Far from Cox's claim that Accipiter is seeking a guaranteed "profit at all times," Accipiter is merely seeking a temporary waiver that will allow the company to survive the transition, grow into the caps and continue to provide service.

III. ACCIPITER REQUIRES ONLY A VERY LIMITED WAIVER OF THE COMMISSION'S RULES.

As described above, in its Petition for Waiver, Accipiter requested: (1) a waiver of the per-line cap until either December 31, 2014 or December 31, 2015, predicated on the assumption that the regression caps do not apply to Accipiter; and (2) a waiver of the FCC rules so that the regression caps would not apply to Accipiter until six months after the FCC has made updated regression cap formulas publicly available and corrected the errors and incorrect assumptions and methodologies in its regression cap formulas.

With respect to the request for a waiver of the per-line cap, in its Petition for Waiver, Accipiter noted that the Commission had not clarified which line count would be used to calculate the per-line cap. In particular, if the Commission were to use Accipiter's 2010 loop

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[19] *Id.* at 5.

count, Accipiter stated that it would require a waiver of the $250 per-line cap until December 31, 2015. If, on the other hand, the Commission uses Accipiter's 2011 loop count, Accipiter would require a waiver only until December 31, 2014.

In fact, consistent with its representations to the Commission that it would grow into the caps as it added lines, Accipiter can now report that if the Commission uses Accipiter's current line count (current as of the second quarter of 2012) rather than arbitrarily using outdated data that is no longer accurate, Accipiter is close enough to the per-line caps that it can survive without waiver of those caps. All Accipiter is asking, then, is that, rather than use out of date line count data that is now inaccurate, the Commission use Accipiter's most current line count data, which reflects Accipiter's continued robust growth. This approach is objective, it is data-driven, and it is consistent with both the Commission's long-term goals for high-cost support as well as with Accipiter's representations regarding its growth. Accipiter urges the Commission to act expeditiously to grant Accipiter a limited waiver that applies the $250 per-line cap and regression independent variables based on Accipiter's present line count, rather than on outdated, inaccurate data.

IV. CONCLUSION

For the foregoing reasons, Accipiter respectfully requests that the Commission grant the waiver requested herein.

Respectfully Submitted

/s/ Patrick Sherrill

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June 20, 2012

EXHIBIT 1

Cox settles suit with rival; may face fines

By Ken Alltucker
THE ARIZONA REPUBLIC

Cox Communications and a private developer paid a tiny telephone company $1 million to settle a lawsuit alleging that Cox and the developer partnered to shut out the rival phone provider.

But Cox still faces the prospect of state-imposed penalties for its role in negotiating a deal with developer Shea Sunbelt to become the main provider of pay television, telephone and high-speed Internet services at the upscale Vistancia community in Peoria.

At issue is whether Cox and Shea Sunbelt crafted a deal to block Accipiter Communications from providing service at the new 17,000-home community.

State regulators are examining a string of e-mails and notes exchanged in 2002 and 2003 among seven Cox employees who relayed a developer's plan to make Cox the sole provider of telecommunications service at Vistancia.

In one message, a Cox employee wrote: "Shea can guarantee to keep out competition. Cox can purchase the knowledge. What is it worth to us."

Another message written by a Cox employee: "Paul and I met with Sunbelt Holdings today and they are giving us some pretty creative ways to keep the competition out."

Cox representatives say they didn't seek to shut out Accipiter. They followed directions of the developer, who crafted the plan.

"The concept was not a concept that Cox created. We were assured this was fine," said Ivan Johnson, Cox's vice president of community relations and televideo. "Certainly we're big boys, and we check out things. At this point, we're comfortable that no laws were broken."

Representatives of developer Shea Sunbelt could not be reached Tuesday. Accipiter officials declined to comment.

The Cox-Vistancia deal is one of many routine "preferred provider" arrangements that

See COX Page D5

Cox settles anti-competition suit

COX
Continued from D1

developers often work out with communications companies. The deals typically give a company, usually Cox or Qwest, the right to provide sales materials at a developer's sales office.

The Cox-Vistancia deal was unusual because Peoria allowed the developer to obtain ownership of communications access, known as an easement, and effectively control which telecommunications companies could reach customers.

Cox paid a $1 million "licensing fee" to the developer for the right to build the telecommunications network and sell services to about 45,000 users. The developer paid Cox $3 million for the cost of building the network.

Accipiter alleged that terms of the deal made it impossible for the small company to compete for customers at Vistancia, so it filed a lawsuit in Maricopa County Superior Court and a complaint with the Arizona Corporation Commission.

Cox and Shea Sunbelt agreed to pay Accipiter $1 million to settle the lawsuit. Other settlement terms required the private communications easement be converted to a public easement. Cox also agreed to allow Accipiter use of its lines to compete for customers at Vistancia.

Even with the lawsuit settled, the Corporation Commission is pressing ahead with its investigation of Cox as part of an effort to determine whether the telecommunications giant engaged in anti-competitive behavior.

"Quite frankly, the e-mails are very troubling, and they suggest a level of involvement in this scheme that demands greater scrutiny," said Commissioner Kris Mayes, who pushed to make the e-mails public. "It is critical to being able to decide whether Cox has engaged in anti-competitive behavior and whether we ought to levy penalties."

Johnson acknowledged that Cox employees wrote the phrase "shut out competition" in notes and e-mail messages, but he said Cox employees were relaying words spoken by the developer during negotiations.

Seven Cox employees in Arizona and at least one employee at the company's Atlanta headquarters helped negotiate the deal or were made aware of its terms.

The e-mails suggest that Cox employees suspected the deal could be controversial.

In a July 2003 message to Cox sales representatives, the company's manager of regulatory affairs wrote, "Did either of you have any problems with the way the developer negotiated use of the easements for Vistancia? ... If we did have a problem with it, please let me know as it could set a precedent for other areas we may want to serve."

Another message suggests that Cox's director of new business development helped negotiate the types of packages offered to Vistancia homeowners.

In an October 2002 message, a Cox employee urged the developer to promote a bundled package of voice, video and high-speed Internet as a way to achieve "higher penetrations" and "more opportunity for greater returns."

Reach the reporter at ken.alltucker@arizonarepublic.com or (602) 444-8285.

EXHIBIT 2

ORIGINAL

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BEFORE THE ARIZONA CORPORATION CC

COMMISSIONERS
JEFF HATCH-MILLER, CHAIRMAN
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

IN THE MATTER OF THE FORMAL COMPLAINT OF ACCIPITER COMMUNICATIONS, INC. AGAINST VISTANCIA COMMUNICATIONS, L.L.C., SHEA SUNBELT PLEASANT POINT, L.L.C. AND COX ARIZONA TELCOM, LLC.	Docket No. T-03471A-05-0064 **NOTICE OF FILING**

The Arizona Corporation Commission Utilities Division ("Staff") hereby provides Notice of Filing of the Testimonies of Elijah Abinah, Matthew Rowell and Armando Fimbres (Redacted Version). A Confidential version of Armando Fimbres' testimony has also been provided under seal to the Commissioners, their Assistants, the assigned Administrative Law Judge and the parties that have signed the Protective Agreement in this case.

RESPECTFULLY SUBMITTED this 15th day of June, 2005.

By _____

Maureen A. Scott
Senior Staff Counsel, Legal Division
Arizona Corporation Commission
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Phoenix, Arizona 85007
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BEFORE THE ARIZONA CORPORATION COMMISSION

JEFF HATCH-MILLER
Chairman
WILLIAM A. MUNDELL
Commissioner
MARC SPITZER
Commissioner
MIKE GLEASON
Commissioner
KRISTIN K. MAYES
Commissioner

IN THE MATTER OF THE FORMAL COMPLAINT OF ACCIPITER COMMUNICATIONS, INC. AGAINST VISTANCIA COMMUNICATIONS, L.L.C. AND COX ARIZONA TELECOM, LLC	)	DOCKET NO. T-03471A-05-0064

REBUTTAL

TESTIMONY

OF

ELIJAH ABINAH

ASSISTANT DIRECTOR

UTILITIES DIVISION

ARIZONA CORPORATION COMMISSION

JUNE 15, 2006

EXECUTIVE SUMMARY
COX ARIZONA TELCOM, L.L.C.
DOCKET NO. T-03471A-05-0064

Staff's testimony believes that the arrangement in the Vistancia development between Cox and Shea violated Federal Telecommunication Act of 1996, Arizona Administrative Code and Commission Orders. In addition, Staff believes the arrangement was both discriminatory and anti-competitive.

Staff recommends that Cox be fined a flat amount of $2 million under A.R.S. 40-424.

INTRODUCTION

Q. Please state your name, occupation, and business address.

A. My name is Elijah Abinah. My business address is 1200 West Washington Street, Phoenix, Arizona 85007.

Q. Where are you employed and in what capacity?

A. I am employed by the Utilities Division ("Staff") of the Arizona Corporation Commission ("ACC" or "Commission") as the Assistant Director.

Q. How long have you been employed with the Utilities Division?

A. I have been employed with the Utilities Division since January 2003.

Q. Please describe your educational background and professional experience.

A. I received a Bachelor of Science degree in Accounting from the University of Central Oklahoma in Edmond, Oklahoma. I also received a Master of Management degree from Southern Nazarene University in Bethany, Oklahoma. Prior to my employment with the ACC, I was employed by the Oklahoma Corporation Commission for approximately eight and a half years in various capacities in the Telecommunications Division.

Q. What are your current responsibilities?

A. As the Assistant Director, I review submissions that are filed with the Commission and make policy recommendations to the Director regarding those findings.

Q. What is the purpose of your testimony?

A. The purpose of my testimony is to recommend the appropriate remedy to the Commission based on Staff's finding as it relates to Cox Arizona Telecom, LLC ("Cox") action and

involvement in the PPA arrangement that grants Vistancia Communications, L.L.C., ("Vistancia") a private easement in the Vistancia development. Mr. Rowell will testify as to whether the Settlement Agreement filed in this docket is in the public interest, in addition, he will also outline Staff's position and findings regarding how Cox's action implicate Commission rules, statutes and policy. Mr. Fimbres will provide testimony and analysis as to Cox's involvement in setting up the arrangement and how the arrangement in Staff's opinion is discriminatory and anti-competitive.

Q. Please provide a brief background of this case.

A. On January 31, 2005, Accipiter Communication Inc. ("Accipiter") filed with the Commission a formal complaint against Vistancia, Shea Sunbelt Pleasant Point LLC ("She" or "Shea Sunbelt"), and Cox.

Q. Please describe the nature or genesis of this proceeding which resulted in the Settlement Agreement?

A. Accipiter filed a Complaint with the Commission alleging 9 separate counts:

Count One of the Complaint alleged that Vistancia was operating as a Public Service Corporation without a Certificate of Convenience and Necessity ("CC&N"), while Count Two alleged the same about Shea Sunbelt. Essentially Accipiter alleged that Vistancia exercised "the sole and absolute right to determine (i) which Communication Service Providers will be granted access to the Development; (ii) which Communication Services will be provided to residents within the Development; and (iii) which Facilities will be constructed within the Development, all in exchange for fees paid for access…" by Cox.[1]

[1] Complaint at page 17 lines 20 – 23.

Count Three of Accipiter's complaint called for the reclassification of Cox's services provided within Vistancia as Non-Competitive. Accipiter argued that the arrangement between Cox and Vistancia did effectively keep other telecom providers out of the Vistancia development and thus it would not be appropriate to classify Cox's services in the development as competitive.

Count Four of Accipiter's complaint called for the revocation of the anti-trust exemption to A.R.S. §40-286 for Cox, Vistancia and Shea Sunbelt.

Count Five claimed that Shea Sunbelt, Vistancia, and Cox were illegally interfering with Accipiter's Carrier-of-Last-Resort responsibilities.

Count Six of Accipiter's complaint alleged that the developer failed to provide Accipiter with a no-cost right-of-way in violation of A.A.C. R-14-2-506(E)(2)(b). This rule states: "Rights-of-way and easements suitable to the utility must be furnished by the developer at no cost to the utility…"

Count Seven of Accipiter's complaint alleged that the arrangement between Cox and Vistancia violated the 2-PIC equal access requirement of R14-2-1111. Accipiter alleged that "Vistancia Communications' exclusionary power to select Communication Service Providers extends to long distance providers.[2]

In Count Eight, Accipiter alleged that the "Exclusionary Scheme" devised by Shea Sunbelt, Vistancia and Cox was designed to prevent competition and should be prohibited.

[2] Complaint at page 32 lines 2 and 3.

In Count Nine, Accipiter alleged that Cox and Vistancia violated A.A.C. R14-2-1112 that requires all local exchange carriers to provide "interconnection arrangements with other telecommunications companies at reasonable prices and under reasonable terms and conditions."

Q. What type of service provider is Accipiter?

A. Accipiter is an Incumbent Local Exchange Carrier ("ILEC") and authorized by the Commission to provide local exchange telecommunications service in a defined territory within the State of Arizona.

Q. What type of service provider is Cox?

A. Cox is a Competitive Local Exchange Carrier ("CLEC") certified to provide local exchange service, throughout the State of Arizona.

Q. Did the Commission designate Accipiter as an Eligible Telecommunications Carrier ("ETC")?

A. Yes.

Q. As an ETC, does Accipiter have the Carrier of Last Resort Obligation ("COLR")?

A. Yes.

Q. Please describe the service obligation imposed on Accipiter as an ILEC.

A. Accipiter as an ILEC has the COLR obligation, which means the Company must be willing and able to serve all end users in their territory.

Q. Is the same obligation imposed on Cox as a Competitive Local Exchange Carrier?

A. No.

Q. Does Staff also believe the arrangement between Cox and Shea was discriminatory?

A. Yes. As stated in Mr. Rowell's and Mr. Fimbres' testimony which I restate below, Staff believes the arrangement was both discriminatory and anti-competitive.

Q. Please restate Mr. Rowell's findings and conclusions.

A. Mr. Rowell's findings and conclusion or recommendation is as follows: since Cox effectively did not pay the $1 million in access fees and any other wireline provider would have to, the arrangement was inherently discriminatory. Any provider other than Cox seeking to bring wireline service into the Vistancia development would have to pay $1 million in license fees that Cox was effectively exempt from. This provided Cox with a significant advantage over any potential wireline competitor. Staff also believes that the arrangement created a barrier to entry that effectively prohibited wireline providers other than Cox from entering the Vistancia development.

Given that the arrangement was discriminatory, Staff can only conclude that it was anti-competitive.

Q. What was Cox's role in the arrangement?

A. The testimony of Mr. Fimbres makes clear that once presented with the private easement concept by Shea, Cox actively participated in drafting the agreements to ensure a discriminatory and anti-competitive result – all of which as will be discussed by Mr. Rowell undermined federal, Commission rules and Order.

Q. Was Cox aware of the discriminatory nature of the arrangement at the time it entered into it?

A. Yes. Ms. Trickey testified that representatives of Shea explained to her that the licensing fees were a method of controlling access to developments.[3] Additionally, in response to Staff data request STF 5.2 Cox states that "The Cox representative … understood that the developer was interested in limiting the number of telecommunications service providers who would provide service in Vistancia because the developer thought that would increase the potential revenue share for the developer." Further in response to Staff data request STF 4.6 Cox stated "At the meeting in February 2003, the developer announced that it was going to charge an access fee ***for anyone else*** that sought access to its private easement, but the developer acknowledged that it could not charge such a fee to Cox because the developer and Cox had already negotiated the terms of their deal…" (Emphasis added.)

Q. At the time the arrangement was accepted and signed, was Cox aware that the arrangement is discriminatory in nature could be construed as anti-competitive?

A. Hand written notes by Cox employees contained on pages C01853 and C01769 of Cox's response to Accipiter's data requests indicate that the intent of the discriminatory license fee was to keep competitors out of the Vistancia development. Those notes were made in February 2003.[4]

Q. How were federal and state laws undermined by the arrangement between Cox and Shea?

A. First, Staff believes that several sections of the Federal Telecom Act were undermined by the arrangement. First, parts (a) and (c) of Section 253 of the Act state as follows:

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[3] Direct Testimony of Linda Trickey page 7 lines 25 thru 27.
[4] See Cox's response to Staff data request STF 4.6.

SEC. 253 [47 U.S.C. 253] REMOVAL OF BARRIERS TO ENTRY.

(a) IN GENERAL. – No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

...

(c) STATE AND LOCAL GOVERNMENT AUTHORITY. – Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and ***nondiscriminatory basis***, for use of public rights-of-way on a ***nondiscriminatory basis***, if the compensation required is publicly disclosed by such government. (Emphasis added.)

While I am not an attorney, I agree with Mr. Rowell that given the plain language of this section and the City of Peoria's involvement, it appears that the arrangement did run afoul of Section 253.

Second, Section 251(b)(4) of the Federal Telecom Act states:

SEC.251. [47 U.S.C. 251] INTERCONNECTION.

...

(b) OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS. – Each local exchange carrier has the following duties:

...

(4) ACCESS TO RIGHTS-OF-WAY. – The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with Section 224.

The relevant part of Section 224 states:

SEC.224. [47 U.S.C. 224] REGULATION OF POLE ATTACHMENTS.

...

(f)(1) A utility shall provide a cable television system or any telecommunications carrier with ***nondiscriminatory access*** to any pole, duct, conduit, or right-of-way owned or controlled by it. (Emphasis added.)

As Mr. Rowell pointed out, due to the inherently discriminatory nature of the arrangement between Cox and Shea, Staff believes it would have been impossible for Cox to have complied with Sections 251 and 224 of the Act had the arrangement stayed in place. These sections require that carriers allow for *nondiscriminatory access* to poles, ducts, conduits and rights-of-way. Because Cox entered into an arrangement with Shea that discriminated against all other carriers, any access to poles, ducts, conduits, or rights-of-way that Cox may have granted would have had to been discriminatory. For example, suppose Cox had granted access to a competing carrier to its conduit in the Vistancia development. That access could not be granted in a non-discriminatory fashion because the competitor would have been required to pay $1 million in licensing fees that Cox had avoided.

Q. How was the Arizona Administrative Code ("A.A.C.") undermined by the arrangement between Cox and Shea?

A. Staff believes that two sections of the A.A.C. are directly implicated by the arrangement. First R14-2-506(E)(2)(b) states that "Rights-of-way and easements suitable to the utility must first be furnished by the developer at no cost to the utility…" Given that under the arrangement between Cox and Shea any other utility would have to had to pay the developer for an easement (i.e., pay the $1 million in licensing fees) it appears that R14-2-506(E)(2)(b) was clearly violated.

Second, R14-2-1112 states that "All local exchange carriers must provide appropriate interconnection arrangements with other telecommunications companies at reasonable prices and under reasonable terms and conditions that ***do not discriminate*** against or in favor of any provider, including the local exchange provider." (Emphasis added.) Similar to the discussion above regarding Sections 251 and 224 of the Federal Telecom Act, the

inherently discriminatory nature of the arrangement between Cox and Shea would have made it impossible for Cox to have complied with R14-2-1112 had the arrangement stayed in place. Any wireline carrier seeking interconnection with Cox's network and seeking to serve the Vistancia development would have been required to pay $1 million in licensing fees that Cox was exempted from. Because of the arrangement Cox had with Shea, there would have been no way for interconnection to be provided on a nondiscriminatory basis.

Q. Were any Commission orders violated?

A. In addition to R14-2-1112 itself, Commission Decision No. 60285 which granted Cox its CC&N contains the following condition:

> "... in areas where Cox is the sole provider of local exchange service facilities, Cox (will) provide customers with access to alternative providers of service pursuant to the provisions of A.A.C. R14-2-1112 and any subsequent rules adopted by the Commission on interconnection and unbundling;"[5]

Thus, Cox's inability to comply with R14-2-1112 under the arrangement necessarily implies that Cox would not have been able to comply with the conditions of Decision No. 60285 under the arrangement either.

In its testimony and in responses to Staff data requests Cox has cited Commission Decision No. 61626 (April 1, 1999.)[6] That decision approved preferred provider agreements ("PPAs") between Qwest and The Community of Civano LLC and between Qwest and Anthem Arizona LLC.[7] Staff does not believe that decision is particularly relevant to this case. The PPAs approved in that decision were substantially different

[5] Decision No. 60285, Finding of Fact 18, subpart (g).
[6] Direct Testimony of Ivan Johnson page 14 lines 15 thru 18 and page 19 lines 6 thru 24 and Cox's response to STF 13.8.
[7] Qwest was then known as US West.

from the arrangement between Cox and Shea that is the subject of this case. Staff believes that it is important to note that the Anthem and Civano PPAs did not contain revenue sharing arrangements. Further, Decision No. 61626 contains an explicit reference to the fact that those PPAs "are not anti-competitive because they do not prevent other carriers from serving potential customers in the developments."[8] As discussed above, Staff does not believe that such a statement can be made about the arrangement between Cox and Shea.

Q. Does Staff believe that the Settlement Agreement is in the Public Interest?

A. Staff believes that the provisions in the Settlement Agreement are in the public interest, in that they eliminate the private easement and hence the $1 million in discriminatory license fees, and the anti-competitive effects of the arrangement between Cox and Shea on a going forward basis. Further the Agreement compensates Accipiter for the harm it suffered as a result of these anti-competitive effects before they were eliminated. However, Staff does not believe that the Settlement Agreement as a whole goes far enough given the egregious nature of Cox's behavior in this case. On a going forward basis, the Settlement Agreement does rectify the anti-competitive effects of the arrangement between Cox and Shea but it does not hold Cox sufficiently accountable for its conduct. Staff is very troubled that Cox was not only willing to enter into the arrangement in the first place, but actively participated in drafting agreements to ensure codification of the anti-competitive and discriminatory nature of the arrangement. There is no doubt based upon Mr. Fimbres' testimony that the arrangement was blatantly anti-competitive and that Cox was much more than a passive and reluctant participant.

[8] Decision No. 61626 page 5 lines 21 thru 24.

Q. Are other important public policy issues implicated by this case?

A. As Mr. Rowell testifies, this case has raised Staff's appreciation of the potential effects of revenue sharing arrangements between telecom providers and developers. When we try to discern the motivation that Shea had to enter into the arrangement with Cox, revenue sharing is the most likely candidate. Because the arrangement between Shea and Cox contained a revenue sharing arrangement whereby Cox paid Shea a higher percentage of revenue as Cox's market share in the development increased, Shea had a direct financial incentive to keep Cox's market share as high as possible. In other words, Shea had a direct financial incentive to keep providers other than Cox out of the development. In its response to Staff data request STF 5.2, Cox appears to have the same belief regarding Shea's motivation: "The Cox representative who made these notes understood that the developer was interested in limiting the number of telecommunications service providers who would provide service in Vistancia because the developer thought that would increase the potential revenue share for the developer."

Q. What is Staff's recommendation as to revenue sharing provisions contained in PPAs?

A. Staff recommends that the Commission identify revenue sharing arrangements as one of the primary issues of the generic docket currently pending to examine PPAs (Docket No. T-00000K-04-0927.) Identifying revenue sharing as a issue will assist Staff in allocating its limited resources as the generic docket goes forward.

Q. What conclusion was reached by Staff witnesses Mr. Rowell and Mr. Fimbres?

A. The conclusion reached by both Mr. Rowell and Mr. Fimbres was that the arrangement at issue was both discriminatory and anti-competitive, and that Cox actively participated in drafting agreements to ensure such a result. In addition, Mr. Rowell reached the conclusion that the agreement violated Commission rules, statutes, and policy.

Q. Was there a process set up to resolve these issues and allegations?

A. Yes. Accipiter, Cox and other parties were involved in settlement negotiations.

Q. Was Staff a party to the negotiation?

A. Yes, to some extent, Staff was involved in negotiation discussions.

Q. Was Staff a signatory to the agreement?

A. No.

Q. Did Staff have the opportunity to review the Agreement?

A. Yes, at several points in the negotiations, Staff offered its observations and input. However, Staff did not see the final Memorandum of Understanding ("MOU") or Settlement Agreement before they were signed. Mr. Rowell in his testimony discusses the agreement and makes recommendations.

Q. In Staff's opinion, has Cox taken positive steps to address the issues raised in the complaint?

A. Yes. Based on the concessions in the Agreement, Staff believes Cox has made a good faith effort to address the issues raised in Accipiter's complaint.

Q. Is the Agreement in the public interest?

A. As stated in Mr. Rowell's testimony to the extent the Agreement resolves the discriminatory and anti-competitive nature of the arrangement on a going forward basis, it is in the public interest.

Section III(1) of the Settlement Agreement eliminates the private easement and hence the $1 million in discriminatory license fees. This essentially eliminates the anti-competitive effects of the arrangement between Cox and Shea on a going forward basis. The remaining substantial sections of the Settlement Agreement compensate Accipiter for the harm it suffered as a result of these anti-competitive effects before they were eliminated.

Q. Does Staff believe that the Settlement Agreement alone is sufficient?

A. No. Given the egregious nature of Cox's behavior in this case and the fact that it acted in concert with Shea to actively undermine federal and state law, Cox should be subject to a monetary penalty.

Q. Please describe the monetary penalty options available to the Commission.

A. The Commission has a variety of monetary penalty options available. There are three main options to consider when deciding the amount of monetary penalties to assess upon Cox. First, under A.R.S. 40-425, the Commission can assess a base fine of up to $5000 per violation. However, under A.R.S. Section 40-424 the Commission has the authority to assess additional fines of up to $5000 per day per violation if it is determined that a company is in contempt of the Commission's orders, rules, or requirements. A.R.S. 40-424 states that the penalties assessed thereunder are cumulative. The Commission could also assess a flat penalty amount within the range of penalties otherwise derived under these statutory provisions. Consistent with A.R.S. Section 40-424, and A.R.S. 40-425 the minimum penalty is $5,000.00 and the maximum is approximately $4.2 million. See EOA Exhibit 1. The Commission has the discretion to impose a penalty within the range of $5,000.00 and $4.2 million.

Q. Does Staff have any additional recommendations?

A. Yes, Staff would recommend that the Cox report file in Docket Control, every six months, all PPA agreements entered into by Cox and provide copies to the Commission. In addition, Cox shall have a commitment in writing not to engage in such behavior in the future.

Q. Please discuss the monetary penalty that Staff is recommending.

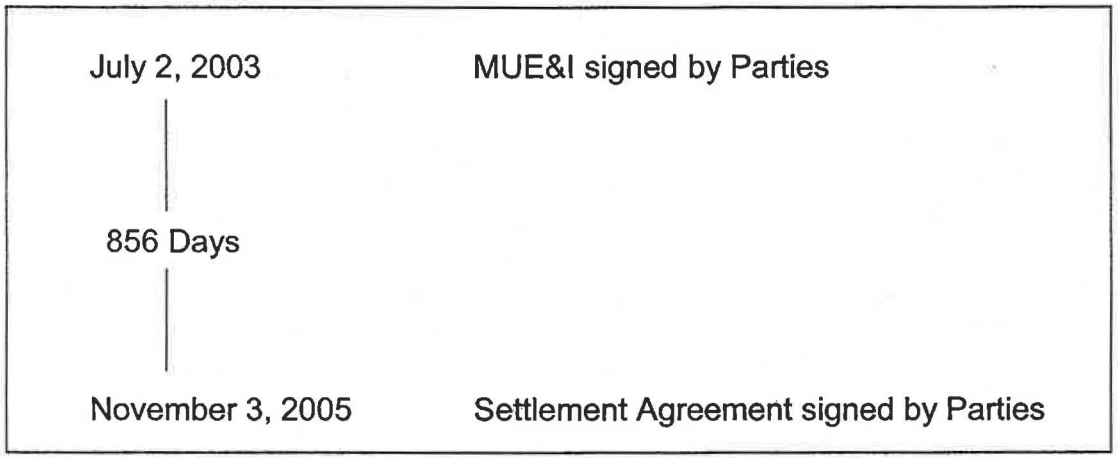
A. Of the monetary penalty options previously discussed above, Staff is recommending that Cox be fined a flat amount of $2 million under A.R.S. 40-424 rather than the maximum amount of approximately $4.2 million. This amount recognizes that with respect to the time period that Cox had the private easement in place, from July, 2003 to September, 2005, Cox's actions were intentional, willful, and contrary to Commission rules and processes. It also takes into account important mitigating factors which I address below.

Q. What mitigating factors did you consider when determining the amount of the fine?

A. I considered the fact that once the arrangement was made public, Cox cooperated with the Commission in taking steps to rectify the problematic aspects of the arrangement. Cox also made a number of important concessions to Accipiter to attempt to bring this matter to conclusion. The Staff is very appreciative of Cox's efforts and believes it is appropriate to consider its cooperation as a mitigating factor when determining the amount of fines in this case. Had Cox not cooperated and Staff had not been presented with any mitigating factors, the fine proposed by Staff would have been much higher, approximately $4.2 million.

Q. Does this conclude your rebuttal testimony?

A. Yes, it does.



856 days X $5,000 per Day = $4,280,000

BEFORE THE ARIZONA CORPORATION COMMISSION

JEFF HATCH-MILLER
Chairman
WILLIAM A. MUNDELL
Commissioner
MARC SPITZER
Commissioner
MIKE GLEASON
Commissioner
KRISTIN K. MAYES
Commissioner

IN THE MATTER OF THE FORMAL COMPLAINT OF ACCIPITER COMMUNICATIONS, INC. AGAINST VISTANCIA COMMUNICATIONS, L.L.C., SHEA SUNBELT PLEASANT POINT, L.L.C. AND COX ARIZONA TELECOM, LLC.	)	DOCKET NO. T-03471A-05-0064

REBUTTAL

TESTIMONY

OF

MATTHEW ROWELL

CHIEF ECONOMIST

UTILITIES DIVISION

ARIZONA CORPORATION COMMISSION

JUNE 15, 2006

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EXECUTIVE SUMMARY
COX ARIZONA TELECOM, L.L.C.
DOCKET NO. T-03471A-05-0064

In this testimony, I describe why Staff believes the arrangement between Cox and Shea is anti-competitive. I also explain why Staff believes that the arrangement between Cox and Shea violated several provisions of the Federal Telecom Act, the Arizona Administrative Code and certain Commission Orders.

Additionally, I describe, and provide recommendations specific to, the Settlement Agreement reached between Cox, Shea, and Accipiter. On a going forward basis the Settlement Agreement eliminates the anti-competitive provisions of the arrangement between Cox and Shea. However, Staff does not believe that the Settlement Agreement goes far enough given the egregious nature of Cox's behavior in this case.

I. Introduction

Q. Please state your name and business address for the record.

A. My name is Matthew Rowell. My business address is: Arizona Corporation Commission, 1200 W. Washington St., Phoenix, Arizona 85007.

Q. What is your position at the commission?

A. I am the Chief of the Telecommunications and Energy section of the Commission's Utilities Division ("Staff").

Q. Please describe your education and professional background.

A. I received a BS degree in economics from Florida State University in 1992. I spent the following four years doing graduate work in economics at Arizona State University where I received a MS degree and successfully completed all course work and exams necessary for a Ph.D. My specialized fields of study were Industrial Organization and Statistics. Prior to my Commission employment I was employed as a lecturer in economics at Arizona State University, as a statistical analyst for Hughes Technical Services, and as a consulting research analyst at the Arizona Department of Transportation. I was hired by the Commission in October of 1996 as an Economist II. I was promoted to the position of Senior Rate Analyst in November of 1997 and to Chief Economist in July of 2001. In my current position I am responsible for supervising nine professionals who work on a variety of telecommunications and energy matters.

Q. What is the purpose of your testimony?

A. My testimony contains a summary of the Settlement Agreement previously filed in this docket and Staff's assessment of whether that Settlement Agreement is in the public interest. I will also discuss how Cox Arizona Telecom, L.L.C.'s ("Cox") actions

surrounding the provision of telephone service in the Vistancia development implicate Commission rules, statutes and Commission policy.

Q. Please describe how your testimony is structured.

A. In order to provide the appropriate context for the discussion of the Settlement Agreement and Cox's actions, I will first briefly summarize the allegations contained in Accipiter's original complaint (filed January 31, 2005) ("Accipiter's complaint" or "complaint.") I will then discuss the Settlement Agreement reached between Accipiter Communications, Inc., Cox Arizona Telecom, LLC, CoxCom, Inc., Vistancia, LLC and Vistancia Communications, LLC ("the Settling Parties"). I will then discuss Staff's position regarding how Cox's actions implicate Commission rules, statutes and Commission policy. I will then provide Staff's position on whether the Settlement Agreement is in the public interest. Finally I will discuss certain policy issues that Staff believes are implicated by this case.

II. Accipiter's Complaint

Q. Please briefly summarize the Complaint filed by Accipiter on January 25, 2005.

A. The complaint consisted of nine counts regarding Cox, Vistancia Communications ("Vistancia") and Shea Sunbelt Pleasant Point, LLC ("Shea Sunbelt").

Count One of the complaint alleged that Vistancia was operating as a Public Service Corporation without a Certificate of Convenience and Necessity ("CC&N") while Count Two alleged the same about Shea Sunbelt. Essentially Accipiter alleged that Vistancia exercised "the sole and absolute right to determine (i) which Communications Service Providers will be granted access to the Development; (ii) which Communications Services will be provided to residents within the Development; and (iii) which Facilities will be

constructed within the Development, all in exchange for fees paid for access…" by Cox.[1] Because of this, Accipiter believes that Vistancia was providing "telephone service."

Count Three of Accipiter's complaint called for the reclassification of Cox's services provided within Vistancia as Non-Competitive. Accipiter argues that the arrangement between Cox and Vistancia did effectively keep other telecom providers out of the Vistancia development and thus it would not be appropriate to classify Cox's services in the development as competitive.

Count Four of Accipiter's Complaint called for the revocation of the anti-trust exemption of A.R.S. §40-286 for Cox, Vistancia and Shea Sunbelt.

Count Five claims that Shea Sunbelt, Vistancia, and Cox were illegally interfering with Accipiter's Carrier-of-Last-Resort Responsibilities.

Count Six of Accipiter's complaint alleged that the developer failed to provide Accipiter with a no-cost right-of-way in violation of A.A.C. R14-2-506(E)(2)(b). This rule states: "Rights-of-way and easements suitable to the utility must be furnished by the developer at no cost to the utility…"

Count Seven of Accipiter's Complaint alleged that the arrangement between Cox and Vistancia violated the 2-PIC equal access requirements of R14-2-1111. Accipiter alleged that "Vistancia Communications' exclusionary power to select Communication Service Providers extends to long distance providers."[2]

[1] Complaint at page 17 lines 20 -23.
[2] Complaint at page 32 lines 2 and 3.

In Count Eight Accipiter alleged that the "Exclusionary Scheme" devised by Shea Sunbelt, Vistancia and Cox was designed to prevent competition and should be prohibited.

In Count Nine Accipiter alleged that Cox and Vistancia violated A.A.C. R14-2-1112 that requires all local exchange carriers to provide "interconnection arrangements with other telecommunications companies at reasonable prices and under reasonable terms and conditions *that do not discriminate against or in favor of any provider, including the local exchange carrier.* (Emphasis added.)

III. The Settlement Agreement

Q. What is the general structure of the Settlement?

A. The Settlement Agreement is composed of three sections. Section I provides the definitions for the terms used within the Agreement. Section II provides the recitals. Section III provides the substantive provisions of the Agreement and is composed of multiple subparts. The substance of the Agreement is contained in Sections III(1) thru III(9). The purposes of these sections are summarized very briefly as follows:

III(1) Changes MUE to a PUE.

III(2) Provides for conduit to be conveyed to Accipiter.

III(3) Provides a wholesale discount for Accipiter.

III(4) Eliminates Exclusive marketing agreement.

III(5) Provides for a $1 million payment to Accipiter.

III(6) Provides for a mutual release.

III(7) Limits the other terms of the Agreement to the Vistancia development and precludes use of the Agreement as precedent in other contexts.

III(8) Keeps Agreement confidential (Subsequently made irrelevant by public filing of Agreement.)

III(9) Provides that the Agreement contains no restriction on the positions parties may take in the generic docket on PPAs.

Q. Does Staff have any concerns with Section I and II of the Agreement?

A. No, it does not.

Q. What is the purpose of Section III(1) of the Agreement?

A. Section III(1) provides for the conversion of the private easement ("MUE")[3] at the Vistancia development to a public easement ("PUE")[4]. The documents[5] to be executed by Vistancia[6] and Cox[7] that are necessary to effect the conversion are identified in subpart (a) and Vistancia is required to diligently pursue review and approval of the documents by the City of Peoria. Further, Vistancia and Cox are required to execute any reasonably necessary and desirable additional documents, or take any reasonable additional steps necessary to fully accomplish the conversion process. The parties agreed that execution and recordation of these documents would discharge Vistancia's and Cox's obligations under this subpart to convert the MUEs to PUEs. In the event that the City of Peoria refused to undertake the actions necessary to accomplish the conversion, Vistancia would be allowed to satisfy its obligations under this subpart by executing a Non-Exclusive License Agreement ("NELA") as described in subpart (b).

In Subpart (b), Vistancia Communications, LLC ("VC") and Vistancia LLC ("Developer") provided their permission to allow Accipiter in the MUEs pending their conversion to PUEs. Vistancia further agrees to execute a temporary NELA substantially

[3] Otherwise known as the Multi-Use Easement.
[4] Public Utility Easement.
[5] Copies of the documents are attached to the Agreement as Exhibits 1A through 1G.
[6] Vistancia refers to Vistancia LLC (fka Shea Sunbelt Pleasant Point, LLC) and Vistancia Communications, LLC.
[7] Cox refers to CoxCom, Inc. and Cox Arizona Telcom, LLC.

in the form of Exhibit 2, free of charge, should Accipiter request such action. Further, Cox agrees that the grant of a NELA to Accipiter by VC does not constitute a breach or violation of any of the terms of the agreements between Cox and Vistancia. Finally, should the City of Peoria refuse to take the actions necessary to convert the MUEs to PUEs as provided in Subpart (a), Vistancia commits to providing Accipiter a fully executed permanent NELA at no charge.

In Subpart (c), Cox and Developer agree that in the future they shall not, independently, jointly, or with third parties, participate in a communications services private easement arrangement in Arizona similar to the MUE that was used in the Vistancia Development.

Q. Has the City of Peoria taken the necessary actions to convert the MUEs to PUEs and have the required documents been recorded?

A. Yes. A copy of the first page of each document required for the conversion of the MUE to a PUE (Exhibits 1A through 1F) were filed in the docket for this matter on December 22, 2005, and each page shows a recorded date of December 20, 2005.

Q. If the City of Peoria had not taken the necessary action to convert the MUE to a PUE, would Staff have had a concern with Section III(1) of the Agreement?

A. Yes. The provisions of Subpart (b) were only applicable to Accipiter and would not have applied to any other carrier who may have desired access to the Vistancia development. Thus, any other carrier would have been subject to the provisions of the MUE. However, since the city of Peoria took the necessary action the MUE has been converted to a PUE and all carriers desiring to provide service to the Vistancia development now have equal opportunity to use the PUE.

Q. What is the purpose of Section III(2) of the Agreement?

A. Section III(2) provides for the provision of conduit by CoxCom and land by the Developer to Accipiter at no cost to Accipiter. Subpart (a) requires CoxCom to provide certain 2 inch conduit along with associated specifications and location drawings. In general, the conduit is located in and along Vistancia Boulevard from Highway 303 to the entrance of the development. Connection to two controlled environment vaults ("CEVs") to be built by Accipiter is included as is conduit to areas of the development were roads had been paved over or rights-of-way otherwise covered prior to Accipiter having access to the MUE. Cox also incurs the cost to disconnect the conduit from existing CoxCom above-ground facilities and to provide access for Accipiter to the conduit. Exhibits 3 and 4 to the Agreement identify the conduit and provide the form for the bill of sale. Upon transfer of ownership of the conduit, Accipiter assumes responsibility for use, maintenance and repair of the conduit. However, Accipiter is precluded from selling, leasing or otherwise transferring ownership of the conduit transferred to the Company by CoxCom. Should any of the conduit remain empty on the fifth anniversary date of the Agreement, Accipiter is required to transfer ownership of any such conduit back to CoxCom. Any conduit that has had fiber installed in it during this five year period is not subject to any of the restrictions of this subpart including the reversion rights.

In Subpart (b), the developer is required to convey to Accipiter, free of charge and without encumbrances, other than what may be allowed by the Agreement, two parcels of land to Accipiter for its CEVs. The Developer is required to execute and record with the Maricopa County Recorder the necessary documents to accomplish the conveyance. The form of these documents was provided in Exhibits 5A through 5F of the Agreement. Any assessments and real property taxes for the two parcels up to, and including, the year in which title is conveyed to Accipiter are to be paid by the Developer. While no particular

value is assigned to any consideration in the Agreement, the Parties agreed that for the purpose of submitting the required "Affidavit of Property Value" a value of $5,000 is reasonable for each CEV parcel. Finally, the Developer is required to provide all easements and/or rights-of-way reasonably necessary for Accipiter to use the two CEV parcels for the purposes intended.

Q. What is the purpose of Section III(3) of the Agreement?

A. Section III(3) provides the provisions for Cox Telecom to provide telephone resale to Accipiter. Subpart (a) establishes the wholesale discount that will be offered to Accipiter by Cox Telcom. The Agreement adopts the same discount that the Commission has approved for Qwest. Residential flat rate service would receive a discount of 12 percent and all other ACC regulated telephone services would receive a discount of 18 percent. Provision of the resold services would be subject to development of a mutually acceptable ordering and provisioning process.

Subpart (b) restricts the availability of the wholesale discount to only those phases of the Vistancia Development where the utility trenches were closed as of December 1, 2005. Exhibit 6 to the Agreement identified trench closures as of September 1, 2005 and the parties agreed to jointly develop a revised Exhibit to reflect closures as of December 1, 2005.

Q. What is the purpose of Section III(4) of the Agreement?

A. Section III(4) provides for the cancellation of the exclusive marketing arrangement between the Developer and Cox. Subpart (a) identifies the Co-Marketing Agreement ("CMA") and the Property Access Agreement ("PAA") as agreements that shall be promptly cancelled. In their place, Cox and the Developer are required to execute two

replacement agreements; the Residential Service Agreement and the Commercial Building Service Agreement. Exhibits 7 and 8 provide the form of the new agreements. Cox is required to continue its non-exclusive provisioning of communication services[8] in the Vistancia Development and to continue its build-out of communication facilities throughout the Vistancia Development. Further Cox is released from its obligation to compensate the Developer for marketing services and homebuilders and commercial developers are no longer required to market exclusively Cox services in the Vistancia Development. Cox, the Developer, and their respective affiliates are required to promptly and unequivocally terminate or otherwise end any exclusivity provisions relating to the provision of communication services or the marketing of such services as may exist in homebuilders' and commercial developers' contracts regarding the Vistancia Development. Finally, Cox, the Developer, and their respective affiliates are precluded from entering into any exclusive marketing arrangements relating to the provision of communications services in the Vistancia Development.

In subpart (b) Vistancia and Cox jointly and severally affirm that they have not entered into any exclusive marketing arrangements relating to communications services in the Vistancia Development other than those which have been identified in the Agreement for termination. Further, Cox is required to represent to the Commission that it and its affiliates have no intention, in the future, of entering into any exclusive marketing arrangements relating to regulated telecommunication services with homebuilders or commercial developers in the Vistancia Development. Accipiter retains the right to advocate, should it choose to do so, that the Commission order Cox to not enter into any exclusive marketing arrangements relating to regulated telecommunication services with

[8] ""Communication Services" shall mean and refer to Cable Television Services, Internet Access Services, and Telephone Services, provided or to be provided to or within Vistancia.", See Exhibit 7, Vistancia, LLC & COXCOM, INC. RESIDENTIAL SERVICE AGREEMENT.

homebuilders or commercial developers in the Vistancia Development. However, absent a Commission Order, should Cox change its intention and enter into any exclusive marketing arrangements relating to regulated telecommunication services with homebuilders or commercial developers in the Vistancia Development, Accipiter has the right to challenge any such arrangements in any appropriate forum. Further, Cox is required to provide Accipiter with notice of its intention to enter into such an arrangement at least 45 days in advance of consummating the arrangement. After any such notice, Accipiter retains the right to approach and compete for the business of the homebuilder or commercial developer identified by Cox in its notice to Accipiter. Finally, should Cox breach its obligations as set forth in the Agreement, Accipiter is precluded from seeking termination of the Agreement as a remedy but is allowed to seek any other appropriate remedy.

In subpart (c) The Developer is required to use its best efforts to encourage homebuilders and commercial developers in the Vistancia Development not to enter into exclusive marketing arrangements with providers of communications services. The subpart provides that, in general, "best efforts" shall be satisfied by i) notification to existing homebuilders and commercial developers that they are no longer required to market exclusively Cox services and that they are discouraged from entering into exclusive arrangements with any communications service provider, ii) notification to future homebuilders and commercial developer that they should consider the services of any communications service provider and that they are discouraged from entering into exclusive arrangements with any communications service provider, and iii) until all sales to homebuilders and commercial developers in the Vistancia Development are complete, provide homebuilders and commercial developers with written information concerning the communication services offered by Accipiter and Qwest whenever either company requests such distribution.

"Best efforts" excludes, however, any requirement for the Developer to refuse to sell property to a potential buyer who expresses desire to enter into an exclusive marketing arrangement, or to reduce the sales price for property as an enticement for a prospective homebuilder or commercial developer to forego a desire to enter into an exclusive marketing arrangement.

In subpart (d) the Developer allows the mounting of external communications antennae on residences in the Vistancia Development to the extent required by federal law and permitted by any covenants, conditions and restrictions recorded for the Vistancia Development.

Q. Does Staff have a concern with Section III(4) of the Agreement?

A. Yes. The definition of "best efforts" in part iii references only Accipiter and Cox. Should any other provider of communications services begin to offer its services in the Vistancia Development, the Developer would have no obligation to supply information regarding this provider to homebuilders or commercial developers as the Developer is required to do for Accipiter and Cox. Thus any new entrant for the provision of communication services in the Vistancia Development would be disadvantaged.

Also, subpart (b) provides that Cox is required to represent to the Commission that it and its affiliates have *no intention* of entering into exclusive telecom marketing arrangements with home builders in the future. Staff believes that this choice of words falls short of a commitment by Cox not to enter into such agreements and thus adds unnecessary ambiguity to the Agreement. When asked through data requests why Cox stated its intention here rather than explicitly committing not to engage in such arrangements, Cox indicated that such a commitment would raise anti-trust concerns because it could be

construed to mean "that Cox and Accipiter have entered into an agreement as to how they will compete."[9] In order to alleviate this concern and eliminate the ambiguity of the Agreement's current language, Staff recommends that the Commission order Cox not to enter into any exclusive marketing arrangements pertaining to telecom services within the Vistancia development.

Q. What is the purpose of Section III(5) of the Agreement?

A. Section III(5) provides for Cox and the Developer to jointly and severally pay to Accipiter that amount of $1,000,000. The Agreement requires the funds to be deposited in an escrow account within three business days of the execution of the Agreement. The full amount, with interest, is to be released to Accipiter from the escrow account upon the occurrence of i) execution of the Agreement including the release provisions Section III(6), ii) the filing of two Notices of Dismissal in the Superior Court Action in the form of Exhibits 9 and 10. In regards to the Parties to the Agreement and their Affiliates, the Notice of Dismissal is to be "with prejudice", and iii) the filing by Accipiter of a Notice of Withdrawal with Prejudice of the complaint filed with the Commission in the form of Exhibit 11 or the withdrawal, dismissal or other resolution with prejudice of the Complaint.

Q. What is the purpose of Section III(6) of the Agreement?

A. Section III(6) provides, in general, the mutual agreement of Accipiter, Cox and Vistancia to forever release and discharge each other and all affiliates from and against all manner of action(s) in law or in equity which they may have had, now have or may have as of the effective date of the Agreement. The mutual release is subject to the conditions set forth in this section. The mutual release is intended to cover any and all demands or causes of

[9] See Cox's response to STF 13.5.

actions and suits which the Parties may have for damages or other losses or expenses known or subsequently discovered relating in any manner to the Superior court Action or the Commission Complaint.

The mutual release is contingent upon all of the following conditions: i) full payment received by Accipiter as set forth in Section III(5), ii) satisfaction of the conditions for the payment as set forth in Section III(5), iii) receipt of a Bill of Sale by Accipiter for the conduit as set forth in Section III(2), iv) receipt of the Deeds for the two parcels of land for CEVs as set forth in Section III(2), and v) completion of the conversion of the MUEs to PUEs, or if the City of Peoria refuses to act, the execution and delivery of a NELA as set forth in Section III(1). A Party may request written acknowledgement from the other Parties that these release contingencies have been satisfied.

Further, contingent upon the MUEs first being converted to PUEs, Accipiter is required to release the City of Peoria as is does the other Parties. The City of Peoria, its officials, officers and employees are intended third party beneficiaries of the Agreement for purpose of this relief. Should the MUEs not be converted to PUEs, the release is not effective as to the City of Peoria. Should the City of Peoria convert the MUEs to PUEs, upon request of a Party, Accipiter is required to promptly confirm its release of the City. Finally, the mutual release between the Parties does not apply to any obligations arising out of the Settlement.

Q. What is the purpose of Section III(7) of the Agreement?

A. With the exception of Section III(1), subpart (c), all of the above terms are limited to the Vistancia Development in connection with the settlement of disputed claims and are precluded from having any precedential effect in any other context.

Q. What is the purpose of Section III(8) of the Agreement?

A. Section III(8) provides an agreement by the Parties that the terms of the Agreement shall be kept confidential. Certain exceptions to confidentiality of the terms were to be allowed; such as i) required by law or regulation, ii) as needed for a judicial or administrative proceeding, iii) to extent disclosed with the Parties' consent or iv) if disclosed to any person or entity other than a Party by someone other than the Party against whom a violation of this section is asserted. In addition, disclosure would be permitted by all of the Parties to lenders, shareholders, attorneys and any other entities or persons with a need to know and who agreed to maintain the confidentiality of the Agreement. The Parties also agreed that disclosure of terms reasonably necessary to carry out the escrow provision of the Agreement was allowed.

Q. Is the entire Settlement Agreement ("Agreement") now a public document?

A. Yes. With the filings by Cox Arizona Telcom, LLC on December 14, 2004 and February 24, 2006, all of the terms and conditions of the Agreement are now public.

Q. What is the purpose of Section III(9) of the Agreement?

A. Section III(9) provides that nothing in the Agreement in any way restricts the positions the Parties may take in the Commission's Generic Docket regarding Preferred Provider Agreements or in any other future regulatory proceeding on the subject.

Q. What are the titles of the remaining sections of the Agreement?

A. The following is a list of the remaining section of the Agreement and their respective titles:

Section III(10)	Breach of Agreement
Section III(11)	Warranty of Capacity to Execute
Section III(12)	Unknown Claims
Section III(13)	Fees and Costs
Section III(14)	Notices

Section III(15)	Acknowledgement of Disputed Liability
Section III(16)	Authority
Section III(17)	Binding Effect
Section III(18)	Counterparts
Section III(19)	Controlling Law
Section III(20)	Contractual Terms
Section III(21)	Further Instruments and Acts
Section III(22)	Continuing Nature of Representations

Q. How would Staff characterize these thirteen sections?

A. Staff would characterize these sections as representative of what Staff might expect to see in a settlement agreement of this type. This characterization is not made in a legal sense, but rather as a general observation based upon Staff's experience.

Q. Does Staff have any comments in regards to these thirteen sections?

A. No, it does not.

IV. Implications of Cox's Actions

Q. Please summarize Staff's beliefs regarding Cox's behavior in this matter.

A. Staff believes that Cox entered into an inherently anti-competitive arrangement with Vistancia and Shea Sunbelt. The arrangement reached between Cox and Vistancia/Shea Sunbelt resulted in barriers to entry and discrimination against wireline carriers other than Cox that were attempting to serve the Vistancia development. Staff also believes that Cox was well aware of the anti-competitive nature of the arrangement with Vistancia/Shea Sunbelt prior to entering into it. Staff Witness Armando Fimbres provides an extensive analysis of the correspondence between the parties which leads Staff to believe there was more than passive acceptance on the part of Cox, rather they actively participated in crafting the arrangement with Vistancia/Shea.

Q. At many places in the above testimony you refer to the "arrangement" between Cox and Vistancia/Shea. Please describe what you mean when you use the word "arrangement" in this context.

A. By "arrangement", I am referring to the terms under which Cox agreed to provide service in the Vistancia development. Those terms are embodied in the agreements entered into between Cox, Vistancia, and Shea Sunbelt. Those agreements are:

1) the CSER entered into between Shea Sunbelt and Vistancia and approved by Cox.
2) the Multi-Use Easements and Indemnity Agreement ("MUE&I") entered into by Shea Sunbelt, Vistancia and the City of Peoria,
3) the Non-Exclusive License Agreement ("NELA-CMA", per Article 1.02) entered into between Vistancia and Cox,
4) a different Non-Exclusive License Agreement ("NELA-PAA", per Article 1.02) entered into between Vistancia and Cox,
5) the Co-Marketing Agreement ("CMA") entered into between Vistancia and Cox
6) and the Property Access Agreement ("PAA") entered into between Vistancia and Cox.

Mr. Fimbres summarizes each of these agreements in his testimony.

Q. Why does Staff believe that the arrangement between Cox, Vistancia and Shea Sunbelt was anti-competitive?

A. Staff believes that the Private Easement described within the NELA-CMA discriminates against carriers other than Cox. Any wireline carrier other than Cox would be required to make two license fee payments of $500,000 each to Vistancia in order to extend facilities into the Vistancia development.

Q. Did Cox have to make the two $500,000 license fee payments in order to extend facilities into the Vistancia development?

A. Not really. On paper Cox did make such a payment, however, when the history of the arrangement between Cox, Vistancia and Shea Sunbelt is examined it becomes apparent that Cox did not actually incur the cost of the $1 million license fee. Staff Witness Armando Fimbres explains this history in detail but the relevant aspects of it are summarized in the testimony of Cox witness Linda Trickey. Ms. Trickey testifies that she became involved in the negotiations between Cox and Shea regarding Vistancia in the fall of 2002. At that time Shea had agreed to make a $2 million capital contribution to Cox and Cox had agreed to a revenue sharing arrangement whereby payments would be made to Shea based on Cox's penetration in Vistancia. Ms. Trickey further testifies that "...at the end of 2002, I understood that the deal was fully negotiated and that the agreements were largely completed." Then after the terms of this agreement had essentially been finalized, Ms. Trickey learned that Shea was proposing new draft agreements.[10] The final agreements that were executed in April of 2003 included a $3 million capital contribution to Cox from Shea and a $1 million payment to Shea from Cox plus the revenue sharing arrangement whereby payments would be made to Shea based on Cox's penetration in Vistancia.[11] Thus, the deal changed from a $2 million payment from Shea to Cox with revenue sharing to a $3 million payment from Shea to Cox with a $1 million payment from Cox to Shea and revenue sharing. The net effect of the two deals is the same and this is why Staff contends that Cox did not actually have to "pay" the $1 million in license fees.

[10] Direct Testimony of Linda Trickey page 3 lines 10 thru 23.
[11] Direct Testimony of Linda Trickey page 9 lines 4 thru 9.

Q. Does Cox acknowledge that the net effect of the change in its agreements with Shea that occurred in the first part of 2003 was zero from Cox's perspective?

A. Yes. Cox witness Tisha Christle testified that: "Shea assured me that these new drafts of the agreements and the use of an MUE would not change the substance of the financial terms of the preferred provider arrangement that Cox had already negotiated with Shea."[12] Ms. Christle further states that, "It was also Shea that offered to pay Cox $3 million in capital contribution and requested a $1 million payment. This was explained as a way to keep the financial arrangement with Cox the same as what had already been negotiated."[13] Additionally, in its response to Staff data request STF 13.14 Cox acknowledges that the $1 million payment to Shea was offset by the increase of the payment from Shea to Cox to $3 million from $2 million.

Q. Does Staff believe the arrangement between Cox and Shea gave Cox an exclusive right to serve the Vistancia development?

A. The arrangement between Cox and Shea was not exclusive on its face. Providers other than Cox could have provided service within Vistancia had they been willing and able to pay the $1 million in license fees. However, such a fee could discourage other providers and could be cost prohibitive. Thus, Staff believes the arrangement was effectively exclusionary.

Q. Does Staff also believe the arrangement between Cox and Shea was discriminatory?

A. Because Cox effectively did not pay the $1 million in access fees and any other wireline provider would have to, the arrangement was inherently discriminatory. Any provider other than Cox seeking to bring wireline service into the Vistancia development would have to pay $1 million in license fees that Cox was effectively exempt from. This

[12] Direct Testimony of Tisha Christle page 3 lines 22 thru 24.
[13] Direct Testimony of Tisha Christle page 4 lines 10 thru 13.

provided Cox with a significant advantage over any potential wireline competitor. Staff believes that the inherently discriminatory nature of the arrangement created a barrier to entry that effectively prohibited wireline providers other than Cox from entering the Vistancia development.

Q. Was Cox aware of the discriminatory nature of the arrangement at the time it entered into it?

A. Yes. Ms. Trickey testified that representatives of Shea explained to her that the licensing fees were a method of controlling access to developments.[14] Additionally, in response to Staff data request STF 5.2 Cox states that "The Cox representative … understood that the developer was interested in limiting the number of telecommunications service providers who would provide service in Vistancia because the developer thought that would increase the potential revenue share for the developer." Further in response to Staff data request STF 4.6 Cox stated "At the meeting in February 2003, the developer announced that it was going to charge an access fee ***for anyone else*** that sought access to its private easement, but the developer acknowledged that it could not charge such a fee to Cox because the developer and Cox had already negotiated the terms of their deal…" (Emphasis added.)

Q. At the time the arrangement was being developed, was Cox aware that its discriminatory nature could be construed as anti-competitive?

A. Hand written notes by Cox employees contained on pages C01853 and C01769 of Cox's response to Accipiter's data requests indicate that the intent of the discriminatory license fee was to keep competitors out of the Vistancia development. Those notes were made in February 2003.[15] These correspondences demonstrate that the licensing fees were *intended* to act as barriers to entry.

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[14] Direct Testimony of Linda Trickey page 7 lines 25 thru 27.
[15] See Cox's response to Staff data request STF 4.6.

Q. Please summarize Staffs argument that the arrangement between Cox and Shea was anti-competitive.

A. Given that the arrangement was discriminatory and effectively exclusionary, Staff can only conclude that it was anti-competitive. Additionally, correspondence between the parties indicates that Cox was aware of the anti-competitive nature of the arrangement and that the arrangement was intended to be anti-competitive.

Q. Is the Federal Telecommunications Act implicated by the discriminatory nature of the arrangement between Cox and Shea?

A. Yes. Staff believes that several sections of the Federal Telecom Act are implicated by the arrangement. First, parts (a) and (c) of Section 253 of the Act state as follows:

> **SEC. 253. [47 U.S.C. 253] REMOVAL OF BARRIERS TO ENTRY.**
> (a) IN GENERAL.--No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
> ...
> (c) STATE AND LOCAL GOVERNMENT AUTHORITY.--Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and ***nondiscriminatory basis***, for use of public rights-of-way on a ***nondiscriminatory basis***, if the compensation required is publicly disclosed by such government. (Emphasis added.)

While I am not an attorney and can not offer a legal opinion, given the plain language of the section and the City of Peoria's involvement it appears that the arrangement did run afoul of Section 253.

Second, Section 251(b)(4) of the Federal Telecom Act states:

SEC. 251. [47 U.S.C. 251] INTERCONNECTION.

...

(b) OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS.--Each local exchange carrier has the following duties:

...

(4) ACCESS TO RIGHTS-OF-WAY.--The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224.

The relevant part of Section 224 states:

SEC. 224. [47 U.S.C. 224] REGULATION OF POLE ATTACHMENTS.

...

(f)(1) A utility shall provide a cable television system or any telecommunications carrier with ***nondiscriminatory access*** to any pole, duct, conduit, or right-of-way owned or controlled by it. (Emphasis added.)

Because of the inherently discriminatory nature of the arrangement between Cox and Shea, Staff believes it would have been impossible for Cox to have complied with Sections 251 and 224 of the Act had the arrangement stayed in place. These sections require that carriers allow for *nondiscriminatory access* to poles, ducts, conduits and rights-of-way. Because Cox entered into an arrangement with Shea that discriminated against all other carriers, any access to poles, ducts, conduits, or rights-of-way that Cox may have granted would have had to of been discriminatory. For example, suppose Cox had granted access to a competing carrier to its conduit in the Vistancia development. That access could not be granted in a non-discriminatory fashion because the competitor would have been required to pay the $1 million in licensing fees that Cox had avoided.

While Cox is likely to argue that "they did not own or control" the rights-of-way at issue here – Vistancia/Shea did – Cox actively participated in the creation of the arrangement that undermined the provisions of the Federal Act. Cox, more than Vistancia/ Shea,

should have been well aware of the Federal Acts emphasis on nondiscriminatory treatment.

Third, Section 214(e)(1)(A) of the Federal Telecom Act states:

SEC. 214. [47 U.S.C. 214] EXTENSION OF LINES.

...

(e) PROVISION OF UNIVERSAL SERVICE.--

> (1) ELIGIBLE TELECOMMUNICATIONS CARRIERS.--A common carrier designated as an eligible telecommunications carrier under paragraph (2) or (3) shall be eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received--
>
> > (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier);

The relevant part of this section of the Act is the requirement that Eligible Telecommunications Carriers ("ETCs") "...shall *throughout the service area* for which the (ETC) designation is received ... offer the services that are supported by Federal universal service support" (emphasis added.) Accipiter, the incumbent local exchange carrier ("ILEC"), was granted ETC status in Commission Decision No. 60549 (December 18, 1997.) This ETC status applies throughout Accipiter's service territory which includes the Vistancia development.

The discriminatory arrangement between Cox and Shea/Vistancia does appear to have interfered with Accipiter's ability to comply with Section 214(e)(1)(A) of the Federal Act. If the arrangement had stayed in place, Accipiter would have had to pay substantial licensing fees that its principal competitor was exempt from in order to offer its services "throughout (its) service area." This interference with Accipiter's ability to comply with

Section 214(e)(1)(A) of the Federal Act is for all intents and purposes equivalent to the issue raised in Count Five of Accipiter's complaint; that the arrangement interfered with its ability to fulfill its Carrier of Last Resort obligation.

Moreover, it is apparent just from Accipiter having filed its complaint that Accipiter wanted to provide local exchange service in the Vistancia development but was inhibited by the $1 million in licensing fees. Additionally, if a customer in Vistancia had wanted to obtain service from Accipiter, it could not have done so with the arrangement in place.

Q. Is the Arizona Administrative Code implicated by the arrangement between Cox and Shea?

A. Yes. Staff believes that two sections of the A.A.C. are directly implicated by the arrangement. First R14-2-506 (E) (2) (b) states that "Rights-of-way and easements suitable to the utility must be furnished by the developer at no cost to the utility ..." Given that under the arrangement between Cox and Shea any other utility would have to had to pay the developer for an easement (i.e., pay the $1 million in licensing fees) it appears that R14-2-506 (E) (2) (b) was clearly violated.

Second, R14-2-1112 states that "All local exchange carriers must provide appropriate interconnection arrangements with other telecommunications companies at reasonable prices and under reasonable terms and conditions that ***do not discriminate*** against or in favor of any provider, including the local exchange provider." (Emphasis added.) Similar to the discussion above regarding Sections 251 and 224 of the Federal Telecom Act, the inherently discriminatory nature of the arrangement between Cox and Shea would have made it impossible for Cox to have complied with R14-2-1112 had the arrangement stayed in place. Any wireline carrier seeking interconnection with Cox's network and seeking to

serve the Vistancia development would have had to of paid the $1 million in licensing fees that Cox was exempted from. Because of the arrangement Cox had with Shea there would have been no way for interconnection to be provided on a nondiscriminatory basis.

The purpose of these provisions is, in part, to ensure that customers have the option of obtaining telephone service from different providers. The arrangement between Cox and Shea/Vistancia took away these competitive benefits from the residents of the Vistancia development rendering them captive customers without any wireline alternatives to Cox.

Q. Were any Commission orders violated?

A. In addition to R14-2-1112 itself, Commission Decision No. 60285 which granted Cox its CC&N contains the following condition:

> "...in areas where Cox is the sole provider of local exchange service facilities, Cox (will) provide customers with access to alternative providers of service pursuant to the provisions of A.A.C. R14-2-1112 and any subsequent rules adopted by the Commission on interconnection and unbundling;"[16]

Thus, Cox's inability to comply with R14-2-1112 under the arrangement necessarily implies that Cox would not have been able to comply with the conditions of Decision No. 60285 under the arrangement either.

Q. Are there other previous Commission Decisions that are relevant to this case?

A. In its testimony and in responses to Staff data requests, Cox has cited Commission Decision No. 61626 (April 1, 1999.)[17] That decision approved preferred provider

[16] Decision No. 60285, Finding of Fact 18, subpart (g.)
[17] Direct Testimony of Ivan Johnson page 14 lines 15 thru 18 and page 19 lines 6 thru 24 and Cox's response to STF 13.8.

agreements ("PPAs") between Qwest and The Community of Civano LLC and between Qwest and Anthem Arizona LLC.[18] Staff does not believe that decision is particularly relevant to this case. The PPAs approved in that decision were substantially different from the arrangement between Cox and Shea that is the subject of this case. Staff believes it is important to note that the Anthem and Civano PPAs did not contain revenue sharing arrangements. Further, Decision 61626 contains an explicit reference to the fact that those PPAs "are not anti-competitive because they do not prevent other carriers from serving potential customers in the developments."[19] As discussed above, Staff does not believe that such a statement can be made about the arrangement between Cox and Shea.

V. Is the Settlement Agreement in the Public Interest?

Q. Does Staff believe that the Settlement Agreement is in the Public Interest, given Staff's analysis of this case?

A. Staff believes that the various provisions of the Settlement Agreement are in the public interest but they do not fully address Cox's behavior in this case. Section III(1) of the Settlement Agreement eliminates the private easement and the $1 million in discriminatory license fees. This essentially eliminates the anti-competitive effects of the arrangement between Cox and Shea on a going forward basis. The remaining substantial sections of the Settlement Agreement compensate Accipiter for the harm it suffered as a result of these anti-competitive effects before they were eliminated.

However, Staff does not believe that the Settlement Agreement goes far enough given the egregious nature of Cox's behavior in this case. On a going forward basis the Settlement Agreement does rectify the anti-competitive effects of the arrangement between Cox and

[18] Qwest was then known as US West.
[19] Decision No. 61626 page 5 lines 21 thru 24.

Shea. However, the Settlement Agreement standing alone is not in the public interest because it does not hold Cox accountable for its anticompetitive conduct in this case. Staff is not only troubled that Cox was willing to enter into the arrangement in the first place but that after it was presented with the concept by Shea, it actively participated in bringing it to fruition. Staff believes that the arrangement was blatantly anti-competitive, undermined the provisions of Federal and State law and that Cox entered into it willingly. Staff Witness Elijah Abinah will discuss Staff's recommendations for further action by the Commission.

VI. Policy Issues

Q. Please discuss the general policy issues that are implicated by this case.

A. This case has raised Staff's appreciation of the potential effects of revenue sharing arrangements between telecom providers and developers. When we try to discern the motivation that Shea had to enter into the arrangement with Cox, revenue sharing is the most likely candidate. Because the arrangement between Shea and Cox contained a revenue sharing arrangement whereby Cox paid Shea a higher percentage of revenue as Cox's market share in the development increased, Shea had a direct financial incentive to keep Cox's market share as high as possible. In other words Shea had a direct financial incentive to keep providers other than Cox out of the development. In its response to Staff data request STF 5.2 Cox appears to have the same belief regarding Shea's motivation: "The Cox representative who made these notes understood that the developer was interested in limiting the number of telecommunications service providers who would provide service in Vistancia because the developer thought that would increase the potential revenue share for the developer."

Q. Given that revenue sharing arrangements have the potential to motivate anti-competitive behavior, what course of action does Staff recommend?

A. Staff recommends that the Commission identify revenue sharing arrangements as one of the primary issues for examination in the generic docket currently open to examine PPAs (Docket No. T-00000K-04-0927.) Identifying revenue sharing as a primary issue will assist Staff in allocating its limited resources as the generic docket goes forward.

Q. Does this conclude your rebuttal testimony?

A. Yes, it does.

BEFORE THE ARIZONA CORPORATION COMMISSION

JEFF HATCH-MILLER
Chairman
WILLIAM A. MUNDELL
Commissioner
MARC SPITZER
Commissioner
MIKE GLEASON
Commissioner
KRISTIN K. MAYES
Commissioner

IN THE MATTER OF THE FORMAL COMPLAINT OF ACCIPITER COMMUNICATIONS, INC. AGAINST VISTANCIA COMMUNICATIONS, L.L.C., SHEA SUNBELT PLEASANT POINT, L.L.C., AND COX ARIZONA TELCOM, L.L.C.	)	DOCKET NO. T-03471A-05-0064

REBUTTAL

TESTIMONY

OF

ARMANDO FIMBRES

PUBLIC UTILITIES ANALYST V

UTILITIES DIVISION

ARIZONA CORPORATION COMMISSION

(REDACTED)

JUNE 15, 2006

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EXECUTIVE SUMMARY
ACCIPITER FORMAL COMPLAINT AGAINST
COX ARIZONA TELCOM, L.L.C.
Docket No. T-03471A-05-0064

Staff's testimony focuses on the anti-competitive nature of actions and steps taken by Cox Arizona Telcom as it planned and began to provide telecommunications services in the Vistancia Master Planned Development during the approximate period of early 2002 through late 2005. Staff's testimony also addresses elements of the direct testimony filed by Cox witnesses – Trisha Christle, Linda Trickey and Ivan Johnson - on April 5, 2006.

Staff reviewed and analyzed over 15,000 pages of information provided by Cox and Accipiter in this matter during the last 15 months and presents testimony in three categories related to anti-competitive behavior for the Commission to consider:

(1) Could Cox's involvement in the Vistancia arrangement be construed to be anti-competitive?
(2) What was Cox management's role in the development of Vistancia agreements?
(3) What was the goal of Cox's behavior in Vistancia?

The available evidence does suggest that anti-competitive barriers to entry by telecommunications providers were created through the use of a "private easement" arrangement developed by Shea Sunbelt, the Vistancia developer, and supported by the City of Peoria and Cox. Cox suggests that the private easement changes were "imposed" on it by Vistancia but Staff believes that Cox, with its resources, executive talent and market authority, had all the necessary means at its disposal to recognize what was emerging and determine corrective action consistent with the Commission's rules and the '96 Telecom Act. Unfortunately, what Staff observes occurred is active participation on the part of Cox.

Staff's review and analysis of the available information suggests that Cox management was well-advised of the events in Vistancia and appears to have participated in the decisions leading not only to the original agreements but to the subsequent private easement changes. The involvement of Cox management in Vistancia appears to have been significant based on the available information. However, there is no evidence that management took steps to address the concerns noted by Cox about the private easement arrangement nor is there any evidence that management took steps to address the anti-competitive nature of the discussions, apparently led by Vistancia personnel, as the original and final agreements were developed. Cox dismisses its participation in discussions where anti-competitive statements were made by attributing the statements to Vistancia and explaining that Cox just "listened".

Staff believes that Cox's behavior in Vistancia was not driven by the need to compete with Wireless providers or VoIP providers or even with Accipiter, as suggested at various points in this matter. Staff believes that Cox's behavior had two objectives – (1) keep Vistancia itself from creating a CLEC and serving the Vistancia development without Cox, and (2) keep Qwest and other CLECs from competing in Vistancia.

1. INTRODUCTION

Q. Please state your name, occupation, and business address.

A. My name is Armando Fimbres. I am a Public Utilities Analyst V employed by the Arizona Corporation Commission ("ACC" or "Commission") in the Utilities Division ("Staff"). My business address is 1200 West Washington Street, Phoenix, Arizona 85007.

Q. Briefly describe your responsibilities as a Public Utilities Analyst.

A. In my capacity as a Public Utilities Analyst, I provide information and analysis to the Utilities Staff on telecommunications tariff filings, major industry issues, such as Voice over Internet Protocol ("VoIP"), and matters pertaining to major applications such as the formal complaint of Accipiter Communications, Inc. ("Accipiter"), against Vistancia Communications, L.L.C. ("Vistancia Com"), Shea Sunbelt Pleasant Point, L.L.C. ("Shea") and Cox Arizona Telcom, L.L.C. ("Cox") filed on January 31, 2005.

Q. Please describe your educational background and professional experience.

A. I received a Bachelor of Science degree from the University of Arizona in 1972 and have taken business and management courses at Seattle University, Northwestern University and the University of Southern California. I was employed for nearly twenty-nine years in Bell System or Bell System-derived companies, such as Western Electric, Pacific Northwest Bell, U S WEST and Qwest. The last twenty years of my Bell System telecommunications experience were in operations planning, corporate planning, or strategic planning roles with a special emphasis from 1994 to 2000 on competitive and strategic analysis for the Consumer Services Marketing division of U S WEST and similarly from 2000 to 2001 for Qwest. I have been with the Arizona Corporation Commission Utilities Division since April 2004.

Q. What is the scope of your testimony in this case?

A. My testimony will focus on the anti-competitive nature of actions and steps taken by Cox (Exhibit AFF-1) as it planned and began to provide telecommunications services in the Vistancia Master Planned Development ("Vistancia") during the approximate period of early 2002 through late 2005. Through the course of my testimony, I will also address elements of the Direct Testimony filed by Cox witnesses – Trisha Christle, Linda Trickey and Ivan Johnson - on April 5, 2006.

2. BACKGROUND

Q. What is the purpose of your testimony?

A. The main purpose of this proceeding is to determine whether the Settlement Agreement is in the public interest. In order to reach that determination, it was necessary for Staff to examine all of the evidence in this proceeding including the conduct of the parties. To put the Agreement in context, a review of the January 31, 2005 complaint by Accipiter may be helpful. Accipiter alleged nine counts involving Vistancia Com, Shea and Cox:

I. Vistancia Communications is operating as a public service corporation without a CC&N in violation of A.R.S. § 40-281 AND A.A.C. R14-2-502, or, alternatively, A.A.C. R14-2-1103.

II. Shea Sunbelt Pleasant Point, LLC, the alter ego of Vistancia Communications, is operating as a public service corporation without a CC&N in violation of A.R.S. § 40-281 and A.A.C. R14-2-502, or alternatively, A.A.C. R14-2-1103.

III. Telecommunications services provided by Cox Arizona Telcom within the development should be reclassified as non-competitive.

IV. The antitrust exemption of A.R.S. 5 40-286 should be revoked for Cox Arizona Telecom, Vistancia Communications and Shea Sunbelt Pleasant Point, LLC.

V. Shea Sunbelt Pleasant point, LLC, Vistancia Communications and Cox Arizona Telcom are illegally interfering with Accipiter's carrier-of-last-resort responsibilities in violation of A.R.S. 5 40-281(B) and the public interest.

VI. The developer failed to provide Accipiter with a no-cost right-of-way in violation of A.A.C. R14-2-506(E)(2)(B).

VII. Cox Arizona Telcom's execution of the NELA-CMA, the NELAPAA, the CMA and the PAA violates Cox Arizona Telcom's Tariffs and the equal access requirement of A.A.C. R14-2-1111.

VIII. The exclusionary scheme devised by Shea Sunbelt Pleasant Point, LLC, Vistancia Communications and Cox Arizona Telcom is designed to prevent competition and should be prohibited.

IX. Cox Arizona Telecom should be required to provide nondiscriminatory interconnection to its network.

Staff witnesses Matthew Rowell and Elijah Abinah will address the degree to which the Settlement Agreement signed by the parties on November 3, 2005 addresses the anti-competitive impacts of the arrangement between Cox and Vistancia and whether or not the Agreement, standing alone, is in the public interest. My testimony presents Staff's analysis of anti-competitive behavior alleged by Accipiter against Cox and, outlined in Count VIII, but in many ways constitutes the key, foundational issue raised by Accipiter throughout its complaint, filed on January 31, 2005.

Q. Can you describe a Preferred Provider Arrangement ("PPA")?

A. First, a PPA is often misunderstood to mean Preferred Provider Agreement which suggests the existence of one document. That is not the case. A Preferred Provider Arrangement or PPA is really the sum of all documents used to describe the terms and conditions

pertaining to an exclusive marketing arrangement between a developer, such as Shea, and a provider, such as Cox. Mr. Ivan Johnson in his April 5, 2006 testimony often uses the term preferred marketing arrangement to mean the same as a PPA. Ms. Christle uses the term preferred provider agreements in her April 5, 2006 testimony.

Q. Can you describe the various PPAs?

A. Some PPAs include only the terms and conditions associated with exclusive marketing of a providers services by the developer. Others include revenue sharing conditions, whereby the developer will share the revenues of a providers based on the penetration of various services, such as cable video, broadband or telecommunications.

Q. Has the Commission approved PPAs in the past?

A. Yes.

Q. How is a PPA different now than in the past?

A. In the Vistancia case, Cox, the provider, was to receive a capital contribution while the developer, Shea, was to receive lump sum payments in addition to revenue sharing. The lump sum payments later became license fees when the agreements were revised.

Q. What is Staff's position on PPAs?

A. Staff is reviewing PPAs in a Generic Docket, T-00000K-04-0927, that has not concluded.

Q. Are PPAs the focus of this proceeding?

A. No. The focus of this proceeding is the private easement arrangement embedded in the agreements which can be summarily described as a PPA.

Q. Can you summarize the general timeframe and key events pertaining to this proceeding?

A. Exhibit AFF-1 contains a timeline that helps put into context many of the events that took place in Vistancia from early 2002 through late 2005. This timeline is useful in addressing the three questions my testimony is designed to address:

(1) Could Cox's involvement in the Vistancia arrangement be construed to be anti-competitive?

(2) What was Cox management's role in the development of Vistancia agreements?

(3) What was the goal of Cox's behavior in Vistancia?

3. GENERAL COMPETITIVE SITUATION

Q. Had the Federal Communications Commission ("FCC") issued its Unbundled Network Element Platform ("UNE-P") remand order in early 2002?

A. The FCC's landmark decision regarding UNE-P had not been issued when Cox's discussions concerning Vistancia began, so corresponding decisions by AT&T, MCI and Sprint to withdraw from residence CLEC services had not been announced.

Q. Why is understanding the UNE-P situation relevant?

A. Had Qwest been the ILEC serving Vistancia, Cox would have been in the position of competing not only with Qwest but with any CLEC who chose to use UNE-P service or even simple Resale services, as mandated by the '96 Telecom Act, from Qwest.

Cox's own 2004 testimony[1] in another matter substantiates the importance of UNE-P services to the competitive situation in Arizona - "More than half of the competition in Arizona is based on unbundled network elements ("UNEs"), including the UNE-Platform

[1] Direct Testimony of F. Wayne Lafferty on behalf of Cox Arizona Telcom, L.L.C., T-01051B-03-0454, November 14, 2004.

("UNE-P") and other elements which recent FCC and court decisions have begun to eliminate."[2]

Q. Has Cox stated that it was concerned about Wireless competition in Vistancia?

A. Cox has sent mixed signals in this area. Despite recent testimony to the contrary, as Staff noted earlier, Cox stated in its April 12, 2005 filing in this matter that – "There also are other options for telecommunications service that may be available in Vistancia now or in the future, such as wireless and Voice over Internet Protocol services". In its May 31, 2005 filing in this matter, Cox also stated – "it is readily apparent that there are numerous competitors in that product market (telecommunications) -- both wire-based providers and wireless providers."

By such statements, Cox may have been attempting to support its competitive posture in Vistancia with the suggestion that Wireless is a significant competitive option when its statements in 2004 are to the contrary.

Q. Does Staff agree with Cox's assertion that VoIP was a major competitive concern for Cox in Vistancia?

A. No. VoIP services can be provided over "anyone's broadband network". Aside from literally blocking VoIP services, an action to which Staff believes Cox has no commitment, Cox has no means by which to limit VoIP competition. Ironically, by simply being an active provider of broadband services, Cox finds itself in the role of enabling the VoIP services of others. As such, competitive responses to VoIP providers must be much different than CLEC competitive responses to traditional wireline

[2] The FCC UNE-P Remand Order was adopted on December 15, 2004.

telecommunications providers. The infrastructures they deploy for themselves can be utilized by others without any legal obligation on the part of Cox.

Q. Please summarize Staff's observations about the general competitive situation pertaining to the Vistancia development.

A. (1) The Arizona telecommunications market was undergoing the same changes that were taking place nationally – consolidation and reorganization.

(2) Cox's plans and actions in Vistancia were likely not heavily influenced by concerns about competition from Wireless competitors.

(3) Cox's plans and actions in Vistancia were likely not heavily influenced by concerns about competition from VoIP competitors.

(4) Wireless and VoIP providers are at a competitive disadvantage with Cox because they cannot offer complete bundles of services.

4. VISTANCIA DEVELOPMENT

Q. What was the state of the Arizona telecommunications market as Vistancia began to take form in early 2002?

A. There was lots of evidence the Arizona customer market was growing at a high rate and would continue to grow for the foreseeable future. The Anthem development, for example, had been announced, as had many others such as D. C. Ranch and McDowell Mountain Ranch. The huge Maricopa project was in development. One of Cox's major projects, Rancho Sahuarita was in development. The impressive growth of Arizona developments is illustrated by Exhibit AFF-2, which includes a list of developments known to Staff since approximately 1999. The growth of planned developments has continued with announcements for developments near Coolidge for another "Anthem"

project and the potential for major projects between Kingman, AZ and Las Vegas, Nevada.

Q. Is there anything unique about Vistancia that should be noted?

A. Vistancia is a development that has been described as reaching 17,000 homes when completed. Although smaller than Anthem, by any measure Vistancia should have been of interest to all facilities-based video, broadband, data and telecommunications providers. Information available to Staff indicates that the two largest providers, Cox and Qwest, of telecommunications services to planned developments were both interested in Vistancia.

Perhaps what makes Vistancia most unique, however, in terms of telecommunications service is its location. About 1/3rd of the property (the southern portion) was originally in Qwest's ILEC service area and the remainder was in the ILEC service area of Accipiter (Exhibit AFF-3). The same boundaries also determined that the area code for the Qwest area would be 623 and the area code for the Accipiter area would be 928. This presented potential service provisioning issues for both ILECs and a potential dialing issue for Vistancia residents.

Q. Why were the two ILEC service territories and two area codes issues?

A. Two ILECs and two areas codes within one development can present network and marketing challenges that translate to increased costs. For the ILECs, the immediate issue is the increased cost arising from the lack of economies of scale. For non-facilities-based CLECs, the issue was the competitive limitations presented by Qwest only serving the 623 area. Facility-based CLECs, like Cox, were not greatly limited by the two area codes, only the marketing challenges and increased costs associated with competing with two ILECs. The market challenges with more than one area code in a development such as

Vistancia involve the need for 10-digit dialing and the resulting potential for customer confusion.

Q. Was Accipiter the major competitive concern of Cox in Vistancia?

A. Mr. Ivan Johnson's own testimony on behalf of Cox states that Accipiter was "a small provider with little name recognition."[3] Mr. Johnson added further emphasis to his statement in responding to Staff's data request[4] – "That statement reflects Mr. Johnson's belief based on his decades of experience in the Arizona communications business - particularly in the Phoenix metropolitan area -- and the fact he had never heard of Accipiter Communications prior to the Vistancia dispute". Staff notes that these statements reference an ILEC that was granted operating authority in Arizona in February 1995, nearly three years before Cox received its original CC&N and seven years before Cox began discussions with Vistancia, and who has existing customers within 10 miles of Vistancia.

A brand that is described as having "little name recognition" only a few miles from a major new development, such as Vistancia, is likely going to have a difficult competitive challenge. If a fifth-generation native of Arizona, like Mr. Johnson, had never heard of Accipiter in early 2002 and, perhaps, not until early 2005[5], its reasonable to assume that Vistancia homebuyers had never heard of Accipiter either. Without a strong video product, Accipiter would have had even more difficulty competing against Cox's bundled services.

[3] Direct Testimony Of Ivan Johnson, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, April 5, 2006, page 16, line 10.
[4] Cox response to STF 11.38.
[5] The Accipiter dispute officially began on January 31, 2005 with the compliant filed with the ACC.

Q. Was the location of Vistancia the real reason that Qwest transferred its Vistancia service area to Accipiter?

A. That appears to be an assertion by Ms. Christle in her April 5th testimony[6] on behalf of Cox, however, Staff does not believe the statement can be supported. When asked by Staff, Cox could not provide any documents to support that statement.

The practical evidence suggests that the location could not have been the major reason why Qwest agreed to transfer its Vistancia service area to Accipiter. As Exhibit AFF-3 illustrates, Qwest has several wire centers in the Phoenix local calling area that extend north of Vistancia – Cave Creek, New River, and Circle City – and the large Anthem development is well north of the entire Accipiter service area. The area transferred by Qwest is actually within the Beardsley wire center. With Qwest's experience in serving large geographic areas throughout its 14-state ILEC region, Staff believes that Qwest would not have seen Vistancia's location as a prohibitive barrier.

Q. Is the relative location of Vistancia really much different than the location of other developments in which Cox provides telecommunications services?

A. Cox currently serves more remote locations than Vistancia. Exhibit AFF-5 illustrates this point. Notice that the distance from Vistancia to Cox's telecommunications end-office switches is considerably less than the distance from Rancho Sahuarita, a major development served by Cox south of Tucson, Arizona. In simple linear terms, the distance from Rancho Sahuarita to Cox's end-office switches is at least 5 times farther than the distance from Vistancia to Cox's telecommunications end-office switches. Even if Cox has deployed the most modern technology and uses the most efficient telecommunications network design available, the largely non-exclusive nature of telecommunications today

[6] Direct Testimony Of Tisha Christle, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, April 5, 2006, page 14, lines 13 - 14.

would mean that the same technology and same efficient telecommunications network design would be available to Qwest as well.

Q. Does Staff agree with Cox's claim about Qwest's cost to serve Vistancia?

A. No. At one point, Ms. Christle states in her testimony[7] - "that Qwest - whom Shea had also approached - sought a capital contribution of as much as $15 million to build the telecommunications infrastructure at Vistancia". However, discovery by Staff on this point indicates that Qwest asked for $3M to $5M (Exhibits AFF-6 & AFF-7), similar to figures that were discussed with and referenced by Cox at various times in Vistancia documentation (Exhibits AFF-8 to AFF-15). Ms. Christle subsequently corrected her understanding in Cox's response to Staff data request STF 11.3.

Staff believes that despite attempts to suggest otherwise, both Cox and Qwest had similar capital cost concerns. Staff does not believe Qwest's decision to withdraw was a function of capital cost.

Q. Please summarize your conclusions about the Vistancia Development and the reasons Qwest chose not to serve the area?

A. (1) Vistancia is an example of Master planned developments.

(2) Cox and Qwest served those Master developments since 2002.

(3) At an early stage, Cox, Qwest and Accipiter were all interested in serving Vistancia.

(4) Vistancia is unique in that it covered the ILEC service areas of Qwest and Accipiter and was in two area codes – 623 & 928.

(5) The ILEC service issue was resolved when Qwest transferred its Vistancia service areas to Accipiter but the areas codes – 623 & 928 – remained unchanged.

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[7] Direct Testimony Of Tisha Christle, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, April 5, 2006, page 3, footnote 2.

(6) The transfer of Qwest service areas in Vistancia to Accipiter resulted in a competitive shift from the dominant ILEC in Arizona to, in Cox's own words, "a small provider with little name recognition."

(7) Cox and Qwest had similar capital cost concerns.

Q. Can you summarize the key points related to Qwest's decision to not participate in Vistancia?

A. Based on Accipiter's response to Staff's data request STF 2.2, it is clear that Qwest had grave concerns about the private easement arrangement in Vistancia.

5. COX ARIZONA TELCOM & ACCIPITER COMMUNICATIONS

Q. Why is it important to have a common, basic understanding of the Cox and Accipiter organizations?

A. Staff believes that some of the events that transpired in Vistancia are related to the characteristics of the two main telecommunications companies involved in this complaint – Cox and Accipiter.

Q. Please explain?

A. The two companies are substantially different by just about every means of comparison. For example, Cox, or more precisely Cox Arizona Telcom, is a wholly-owned subsidiary of CoxCom, Inc. CoxCom, Inc.'s parent is Cox Communications, Inc. headquartered in Atlanta, Georgia and traces its roots back for decades in the video cable industry and even further in the publishing industry, as early as 1898 by some reports. Accipiter Communications, by contrast, was formed in 1995 as a rural ILEC.

Cox Communications is one of the nation's largest broadband communications companies and provides a variety of services in numerous states through the operation of a large number of subsidiaries and other affiliated companies. Those operations and services include cable television, local and long distance telephone, digital video, and high-speed Internet access. Cox is described as having 6.6 million total customers, including more than 6.2 million basic cable subscribers. Cox also describes itself[8] as serving 1.5 Million telephone customers. Accipiter, by comparison, serves a 700 square-mile region of rural Central Arizona that includes Southern Yavapai County and Northern Maricopa County and only a few hundred customers.

Cox Communications describes itself as having 77,000 employees, nationally, with annual revenues over $11 Billion. Accipiter, by comparison, serves only Arizona customers with very few employees and has only a few million in annual revenues.

Q. Please summarize your conclusions about the Vistancia Development?

A. (1) Cox Communications is centered on video cable services. Telecommunications are a relatively small part of Cox Communications' revenues; Accipiter's only business, at present, is in telecommunications.

(2) Cox Communications is a huge national business; Accipiter is relative small and operates only in Arizona.

(3) Cox Communications management is in various locations throughout the US, has relatively few individuals located within Arizona.

[8] http://www.cox.com/Telephone/.

6. STAFF'S ANALYSIS

Q. Please outline Staff analysis in this matter.

A. Staff reviewed and analyzed over 15,000 pages of information provided by Cox and Accipiter in this matter during the last 15 months and presents testimony in three categories related to anti-competitive behavior for the Commission to consider.

(1) Could Cox's involvement in the Vistancia arrangement be construed to be anti-competitive?

(2) What was Cox management's role in the development of Vistancia agreements ?

(3) What was the goal of Cox's behavior in Vistancia?

6.1 COULD COX'S INVOLVEMENT IN THE VISTANCIA ARRANGEMENT BE CONSTRUED TO BE ANTI-COMPETITIVE?

Q. Does Staff believe anti-competitive barriers to entry were created in Vistancia?

A. Yes. Based on the information provided by Cox and Staff's review of the agreements, Staff believes that the Vistancia arrangement was designed to impose additional obstacles on other carriers through the creation of a private easement arrangement that included a license fee.

Q. What agreements in Vistancia created the private easement arrangement?

A. There were a total of six different agreements between Cox, Shea and Vistancia. Those agreements were: (1) Co-Marketing Agreement dated April 8, 2003; (2) Property Access Agreement dated April 8, 2003; (3) Amended and Restated Co-Marketing Agreement dated September 25, 2003; (4) Amended and Restated Property Access Agreement dated September 25, 2003; (5) Non-Exclusive License Agreement dated December 31, 2003, relating to the Restated Property Access Agreement; (6) Non-Exclusive License Agreement dated December 31, 2003 relating to the Restated Co-Marketing Agreement.

The agreements created a private easement arrangement which combined with other aspects of the Agreements had the effect of keeping competition out of the development. Those agreements were summarized in an earlier filing in this proceeding and are attached here as Exhibit AFF-29.

Q. What made the private easement anti-competitive?

A. The most striking condition within the documents[9], that were devised by Vistancia and Cox, as alleged by Accipiter, and together create the private easement and associated terms and conditions, is a license fee that equals $1 Million dollars[10]. Additionally, the NELA-CMA called for compensation payments to Vistancia based on a sliding scale of provider revenues achieved within the Vistancia community from 15% of revenues at 75% penetration to 20% of revenues at 96% penetration[11].

Q. How did the private easement benefit Vistancia and Cox?

A. Schedule 3.01 of the NELA-CMA attached as LT-6 in Ms. Trickey's April 5, 2006 testimony can be used to clarify why the private easement was of benefit to Vistancia.

The NELA-CMA also contains a revenue sharing element beginning at a penetration level of 75% and rising in four increments to 96%. At the 75% level, Vistancia would share in 15% of the Cox revenue derived from the services outlined in Schedule 3.01, rising to 20% at 96%. Its entirely possible that considerably more revenue could be gained from the revenue sharing than the two fees equaling $1 Million. The license fees were unique to Vistancia but the revenue sharing was not. Simply comparing the revenue sharing

[9] CSER, MUE&I, CC&Rs, NELA-CMA, NELA-PAA, CMA and PAL, page 12, line 19, Accipiter compliant application, T-03471A-05-0064.
[10] Schedule 3.01, Non-Exclusive License Agreement ("NELA").
[11] Commercial properties where addressed with a NELA-PAA with similar penetration levels but lower revenue sharing percentages.

agreements with two other developments[12] served by Cox discloses that Vistancia's percent revenue share was relatively high compared to other developments.

The difference in revenue sharing levels for Vistancia compared to other developments was in part tied to the inclusion of the capital contribution from Vistancia to Cox that was not present in other developments[13]. Therefore, its relatively simple to see that Vistancia would only recoup its capital contribution if Cox achieved the stated penetration levels. The revenue risks for Vistancia were directly tied to the competitive risks. The potential revenue could be maximized if the competitive risks could be minimized.

The benefit of the private easement arrangement was, therefore, to minimize the competitive risks and, thereby, maximize the potential revenue. Other providers, such as Accipiter and Qwest, chose not to pay the license fees nor accept the terms of Schedule 3.01.

The Cox emails in Exhibits AFF-22 and AFF-30 explain the benefits of the private easement arrangement in Cox's own words.

Q. Was Cox an active participant in creating an anti-competitive environment in Vistancia?

A. Yes.

[12] Rancho Sahuarita and Surprise Village.
[13] Direct Testimony Of Linda Trickey, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, April 5, 2006, page 6; AFF-22.

Q. Did Staff find that Cox participated in creating an anti-competitive environment in Vistancia?

A. The fundamental fact that Vistancia created a private easement arrangement with the support of the City of Peoria is not in question. At numerous places in discovery documents, in responses to data requests and most recently in Mr. Johnson's testimony, Cox admits that "...Cox accepted the arrangement. Cox acknowledges that it agreed to serve Vistancia under the developers' terms..." It is Staff's position that Cox understood the anti-competitive consequences of the private easement arrangement and, therefore, actively participated rather than just accepted a condition that was forced, or imposed, on it by Vistancia.

Q. What are some of the facts behind Staff's position?

A. First, there is the decision by Cox to amend its original agreements with Vistancia to participate in the private easement changes. Accipiter states in it application[14] that the Common Services, Easements and Restrictions ("CSER") agreement was "the heart of a carefully crafted scheme" by Vistancia. The statement appears to be supported by the fact that other documents followed the acceptance of the CSER.

Exhibit AFF-17 contains a May 27, 2003 email from Lesa Story, Vistancia's attorney, explaining that "...Cox has the right to review and approve the CSER prior to recording it." Cox did not have to approve or accept the CSER; Cox chose to do so.

Q. Does Staff agree that the private easement arrangement was imposed on Cox?

A. No. Exhibit AFF-17 suggests that Cox had no such requirement. Cox has not provided any evidence that it was "required" legally to support the private easement changes.

[14] Accipiter compliant application, T-03471A-05-0064, page 7.

Q. Based on information provided to Staff, did Cox perform any legal analysis of the private easement arrangement?

A. No. At several places in testimony and data request responses, Cox states it accepted the assurances of Vistancia.[15]

Q. Why did Cox choose to approve changes that include a private easement arrangement?

A. Cox contends that accepting the private easement arrangement was legal and did not change the financial terms that had already been accepted. Ms. Trickey states in her April 5, 2006 testimony that on behalf of Cox she accepted the assurances[16] of Lesa Storey, Vistancia's attorney, that the private easement arrangement had been used legally in other locations. Ms. Trickey also explained that "... this language imposed no real obligation on Cox..." However, with her extensive background and experience in telecommunications industry, Ms. Trickey should have understood the anti-competitive nature of the Agreements.

With these two points, Cox appears to have taken the position that there was no reason not to cooperate with Vistancia. If this was truly the case, however, Staff wonders why Cox subsequently took the cautionary step of changing its indemnity position related to the private easement arrangement. The testimony of Ms. Trickey[17] makes clear that Cox made the changes to further indemnify Cox should Shea be sued by a third party objecting to the private easement arrangement.

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[15] Direct Testimony Of Linda Trickey, On Behalf Of Cox Arizona Telcom, L.L.C , T-03471A-05-0064, April 5, 2006, pages 5 and 8; STF 12.8; STF 13.12.
[16] Direct Testimony Of Linda Trickey, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, April 5, 2006, page 4.
[17] Direct Testimony Of Linda Trickey, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, April 5, 2006, page 11.

Although Cox may argue that these agreement changes were standard legal revisions that would have been made by any cautious client, the timing of events leads Staff to believe more was involved.

Q. What other changes did Cox make in addition to approving the CSER?

A. Amendments to the original CMA and PAA, resulted in two subsequent sets of documents – the Amended CMA & Amended PAA and the NELA-CMA & NELA-PAA. Cox defends these changes by insisting that the changes did not impact the financial terms and conditions originally reached with Vistancia.

In the original CMA, for example, Cox was to receive $3 Million from Vistancia and Cox would pay Vistancia $1 Million plus additional compensation as outlined in Exhibit G of the CMA. The Amended CMA retained language explaining that Cox would receive $3 Million from Vistancia, however, the Cox payment of $1 Million to Vistancia plus additional compensation as outlined in Exhibit G was moved from the original CMA to Schedule 3.10 of the NELA-CMA and became the license fee that would be required of all providers. By agreeing to change its CMA into an Amended CMA and NELA-CMA, Cox in effect enabled the imposition of the $1 Million license fee requirement on all other providers without changing the financial impact on itself – Cox still received the net $2 Million it had requested.

Rather than the private easement arrangement being imposed on Cox, the imposition of the private easement arrangement on other providers was enabled by Cox through its participation.

Q. Are there any other facts behind Staff's position that Cox was an active participant?

A. In a second major category of findings, Staff points to the numerous indicators signaling the intentions of both Vistancia and Cox.

Discovery page C01773 (Exhibit AFF-19) contains a handwritten note concerning a 10/8/02 meeting where it was suggested that "Shea can guarantee to keep out the competition. Cox can purchase the knowledge. What is it worth to us."

Discovery page CX05963 (Exhibit AFF-20) REDACTED

In responding to STF 4.6, Cox states – "At the meeting in February 2003 (2/13/03 per Exhibit AFF-11), the developer announced that it was going to charge an access fee for anyone else that sought access to its private easement, but the developer acknowledged that it could not charge such a fee to Cox because the developer and Cox had already negotiated the terms of their deal."

In responding to STF 5.2, Cox states – "The Cox representatives did not "discuss" those issues with the developer (2/13/03 per Exhibit AFF-11), but rather just listened to the developer's position and assertions... The Cox representative who made these notes understood that the developer was interested in limiting the number of telecommunications service providers who would provide service in Vistancia because the developer thought that would increase the potential revenue share for the developer."

Discovery page C01769 (Exhibit AFF-11) contains a handwritten note referencing a 2/13/03 meeting – "Sunbelt (Vistancia) gives us $5 million and we give them back $3 million to keep out the competition."

Discovery page C01853 (Exhibit AFF-13) contains an email stating – "Paul and I met with Sunbelt Holdings today (2/18/03) and they are giving us some pretty creative ways to keep the competition out. From a financial stand point we need your input."

Discovery page C01261 (Exhibit AFF-14) contain a handwritten note referencing a 2/24/03 meeting – "$3 Million…to build barrier…for…provider access."

Discovery page C0001 (Exhibit AFF-18) contains an email dated 7/16/03 that states – "Did either of you have any problems with the way the developer negotiated use of the easements for Vistancia? My understanding is that Qwest and another carrier are fighting the way the developer wanted to negotiate the use of the easement."

In responding to STF 6.8 and C0001 (Exhibit AFF-18) regarding a 7/16/03 email, Cox states – "Cox remained concerned that private easement arrangements were not necessarily a good thing, even after the private easement was approved by the City of Peoria."

Staff does not believe that Cox could have missed the underlying anti-competitive nature of such information.

Q. Please summarize your conclusions about Cox's support in creating anti-competitive barriers to telecommunications entry in Vistancia.

A. (1) Cox approved and accepted the CSER changes; Cox was not required to approve and accept the CSER changes; Cox participated in amending the agreements.

(2) By its own statement, Cox agreed to serve under Vistancia's terms and conditions.

(3) Although Cox states it assumed the private easement arrangement was legal, Cox amended the Vistancia agreements to further indemnify Cox.

(4) Cox had numerous indicators, as referenced earlier, signaling the anti-competitive behavior underlying the private easement arrangement in Vistancia.

(5) Through amendments of the original CMA and PAA agreements that led to the Amended CMA & Amended PAA and NELA-CMA & NELA-PAA, Cox directly participated with Vistancia in imposing the private easement arrangement license fee on other wireline providers.

(6) Numerous emails suggest that Cox understood the anti-competitive nature of the agreements.

6.2 WHAT WAS COX MANAGEMENT'S ROLE IN THE DEVELOPMENT OF VISTANCIA AGREEMENTS?

Q. Does Staff believe that Cox management actively participated in building anti-competitive barriers in Vistancia?

A. Yes. Staff's review and analysis of the available information (discussed below) suggests that Cox management was well-advised of the events in Vistancia and appears to have participated in the decisions leading not only to the original agreements but to the subsequent private easement changes.

Q. How was Cox management involved?

A. By examining the discovery responses provided by Cox and Accipiter, Staff has been able to count at least 56 Cox employees (Exhibit AFF-21) or contract workers who were involved in one form or another with the Vistancia development from early 2002 to late 2005. Although most of the employees were not part of management and not all were involved in Vistancia agreement discussions but, through the course of such a major

project, all may have been in a position to provide feedback to upper-management about telecommunications concerns, such as those that are the focus of this matter.

Cox's response to STF 9.7 (Exhibit AFF-21) indicates that at least 32 of the 56 individuals were management positions and that excludes the 10 individuals that no longer work for Cox. One of the active participants was a business Director.

Staff also notes that at least 5 Cox in-house attorneys[18] supported the Vistancia project although Ms. Trickey has been identified as the attorney directly overseeing the Vistancia agreements involving the private easement arrangement. Staff issued four separate data requests asking Cox to identify in what other jurisdictions was a private easement utilized[19]. The Company was unable to identify other jurisdictions where the private easement arrangement had been utilized other than Arizona. In their testimony filed on April 5, 2006, Ms. Christle and Ms. Trickey, continue to explain that the private easement arrangement had been utilized in "other parts of the country." However, Staff has discovered that Cox knew as early as December 23, 2002 that the private easement arrangement had been used in Indiana[20] (Exhibit AFF-28). Email communications from Vistancia to Cox, with attached documents, actually denote an Indianapolis attorney, with an Ameritech email address, and name Indiana in Section 2.05 of what appears to be a draft CSER for Vistancia. Despite opportunities in 4 data request responses and 5 pages of testimony[21], Cox has been less than candid in acknowledging the State (Indiana), in which the private easement arrangement was used previous to Arizona.

[18] STF 4.1.
[19] STF 4.2, STF 11.15, STF 12.12, STF 13.23.
[20] C01655 (email) , C01656 (CSER front page), C01675 (CSER section 2.05).
[21] Direct Testimony Of Tisha Christle, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, April 5, 2006, pages 4 and 9; Direct Testimony Of Linda Trickey, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, April 5, 2006, pages 4, 5, and 11.

Q. Was Cox upper management involved?

A. Yes. Exhibit AFF-21 indicates that about 7 individuals with the title of Vice President or General Manager.

The VP of Business Operations is the executive who appears to have been most directly involved. He signed the original agreements and the amended agreements involving the private easement arrangement. Communications either directed to him or copied to him can be found on numerous discovery emails. REDACTED (Exhibit AFF-22) REDACTED Five months later, the same executive was copied on the email in Exhibit AFF-13 regarding "pretty creative ways to keep the competition out". This executive and Cox, in general, may have taken action based on an evaluation of the anti-competitive context of the email he was sent on 2/28/03 (Exhibit AFF-13). In fact, Staff has been unable to find any information indicating upper management concern with any action to the anti-competitive nature of the communications between Vistancia and Cox employees.

Cox dismisses its participation in discussions where anti-competitive statements were made by attributing the statements to Vistancia and explaining that Cox just "listened"[22]. Cox explained in its response to STF 4.4 that Vistancia was informed about the Commission rules regarding area codes, however, Staff notes that the anti-competitive statement attributed to Vistancia in C01784 (Exhibit AFF-4) is recorded on November 25, 2003, more than a year after the earliest anti-competitive statements found by Staff (Exhibit AFF-19). If efforts were made by Cox to eliminate anti-competitive discussions with Vistancia, the efforts appear to have failed or were not taken until after 2003.

[22] Cox response to STF 5.2.

Q. Was there any direct suggestion to circumvent Commission rules?

A. Yes. Based on a handwritten note by a Cox employee that states "doing (area code) 623 in (area code) 928 and getting hand slapped later", Exhibit AFF-4 appears to Staff to be a direct request to circumvent Commission rules and illustrates a cavalier attitude about the consequences.

Q. Please summarize your conclusions about Cox management's role in Vistancia?

A. (1) At least 32 of the 56 Cox employees (Exhibit AFF-21) found by Staff in discovery information are believed to be management employees.

(2) At least 5 Cox in-house attorneys[23] were involved in Vistancia.

(3) As many as 7 Cox upper management executives (Exhibit AFF-21) are believed by Staff to have been involved with Vistancia.

(4) Staff has found evidence that the Cox executive who signed the original agreements and the amended agreements involving the private easement arrangement was aware of at least some of the anti-competitive discussions between Vistancia and Cox project participants.

(5) Staff can find no evidence that Cox management took steps to deal with the anti-competitive nature of the communications between Vistancia and Cox project participants.

6.3 WHAT WAS THE GOAL OF COX'S BEHAVIOR IN VISTANCIA?

Q. What else needs to be understood about Cox's behavior in Vistancia?

A. Staff believes that Cox's behavior in Vistancia was not driven by the need to compete with Wireless providers or VoIP providers or even with Accipiter, as suggested at various points in this matter. Staff believes that Cox's behavior had two objectives -- (1) keep

[23] STF 4.1.

Vistancia itself from creating a CLEC and serving the Vistancia development without Cox, and (2) keep Qwest and other CLECs from competing in Vistancia.

Q. What evidence does Staff have for these beliefs?

A. First, Staff found two discovery items which indicate Cox had been informed that Vistancia was inquiring about the process for obtaining a CLEC license. (AFF-24).

Q. Does that suggest anti-competitive behavior?

A. By themselves, the note and email only express a competitive concern, not actions. This information, however, does suggest some of the motivation for Cox's subsequent participation with the private easement arrangement driven by Vistancia.

Q. Please clarify Staff's observation?

A. By September 2002, Cox project personnel had already been in discussions regarding Vistancia for 6 – 9 months. This was enough time to understand that the odds were very high that Accipiter would eventually become the ILEC with carrier-of-last-resort responsibility in the Vistancia development, rather than Qwest. In early 2002, the developer was reportedly asking[24] that one ILEC serve Vistancia rather than splitting the development between Qwest and Accipiter. Additionally, Accipiter had already signaled its interests in obtaining the Qwest service areas within Vistancia with a Commission filing on September 22, 2002. The Exhibit AFF-24 email was not sent until September 30, 2002.

A decision to assign Accipiter ILEC authority throughout Vistancia would result in not only the exit of Qwest as a wireline competitor but also all CLECs dependent on Qwest's

[24] Accipiter Complaint, T-03471A-05-0064, page 4, lines 10 - 15.

facilities for UNE-P or Resale services. With that likelihood, actions by Cox to invite the entry of Vistancia as a facilities-based CLEC would clearly have been counterproductive to Cox's competitive position. For competitive reasons outside of Vistancia, Cox did not want Vistancia to become a CLEC. As the Exhibit AFF-24 email indicates, CLEC success on the part of Vistancia could have motivated other developers to become CLECs and presented a significant change in the competitive environment for Cox.

Q. Please explain why Cox did not want Vistancia to operate a CLEC.

A. Exhibit AFF-25 makes clear that Cox had a longer term business interest with the Vistancia developer – "We are confident that through this exclusive agreement, we will be able to further our partnership to secure future projects, capitalizing on the success of Vistancia for both Cox and Sunbelt/Shea." Actions that reduced the need for Vistancia to form a CLEC also supported the business goals of Cox as a partner in future projects with the Vistancia developer. Therefore, Cox's participation with the Vistancia private easement arrangement had three positive results for Cox – (1) a Vistancia CLEC that would have excluded Cox was not formed, (2) Cox enhanced its relationship with a key developer for future projects, and (3) wireline competitors were excluded from Vistancia.

Q. What about Cox's second objective – keep Qwest and other CLECs from gaining a major competitive position in Vistancia?

A. Qwest is Cox's primary local exchange competitor in Arizona. Staff also observes that Qwest has been Cox's only competitor for PPAs to serve major master planned developments. As Mr. Johnson points out in his testimony[25], Qwest has succeeded in several master planned developments. Staff notes that none of the Cox witnesses point to any ILEC or CLEC serving planned developments – other than Qwest.

[25] Direct Testimony Of Ivan Johnson, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, April 5, 2006, page 19.

Although the Generic PPA docket[26] has not been concluded, Staff believes it can safely state that Qwest and Cox are the only wireline providers serving planned developments with PPAs. Therefore, when Cox began its negotiations with the Vistancia developer, Cox understood its main competitor was Qwest, not Accipiter.

Q. When did Vistancia and Cox learn of Qwest's decision to exit Vistancia?

A. The timeline in Exhibit AFF-1 shows that Qwest officially filed to withdraw it objections to the Accipiter transfer application on December 22, 2003, well after Vistancia recorded its MUE&I on July 23, 2003 and Cox began amending its CMA and PAA agreements on September 25, 2003. Staff notes that Qwest was aware of the private easement arrangement by at least July 1, 2003. As late as August 27, 2003, Qwest was discussing possible challenges to the private easement arrangement with Accipiter[27].

As the email in Exhibit AFF-18 indicates, Cox knew on July 16, 2003 that Qwest was concerned about the private easement arrangement. Use of the term "fighting" in reference to Qwest's concerns by the Cox employee authoring the email may have been more than just a random choice of words. Cox employees understood that challenges to the private easement arrangement were possible.

Q. Does anything else support Staff's belief that Qwest was the major competitive concern of Cox?

A. The Settlement Agreement that was reached in November 2005 adds to Staff's beliefs. When the Settlement Agreement was reached, Cox understood that:

(1) Qwest had no ILEC authority in Vistancia.

(2) Qwest had no CLEC authority in Arizona.

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[26] T-00000K-04-0927.
[27] Accipiter response to STF 2.2.

(3) Staff had filed reports in Qwest's CLEC application[28] recommending that Qwest not be granted CLEC residence authority within Qwest's ILEC service areas.

(4) Qwest's potential residential CLEC[29] participation outside of Qwest's ILEC service areas, when authorized, was going to be at least two years and potentially much more behind that of Cox.

Q. Please summarize your conclusions about the objective of Cox's behavior in Vistancia?

A. (1) Cox did not want Vistancia to form a CLEC and serve the Vistancia development without Cox.

(2) Cox was interested in building a strong relationship with the Vistancia developer for future developments.

(3) Cox entered into discussions with Vistancia about the private easement arrangement well before Qwest decided to transfer its Vistancia service areas to Accipiter.

(4) Cox signed its Settlement Agreement with Accipiter knowing that the competitive presence of Qwest was highly unlikely, in any form, in the foreseeable future.

(5) Cox was interested in keeping competition out of Vistancia.

7. CONCLUSION

Q. Was the private easement arrangement anti-competitive?

A. Yes. The key supporting facts are as follows:

(1) Use of the private easement arrangement cannot be defended based on the belief that Wireless and VoIP competition would be unrestricted in Vistancia. Statements entered into testimony by Cox indicate that Wireless or VoIP competition were not considered major factors.

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[28] T-02811B-04-0313
[29] Decision 68447 granting Qwest CLEC authority was not issued until February 2, 2006.

(2) The private easement arrangement was designed to reduce competition by facilities-based wireline providers.

(3) Cox considered Accipiter to be a "small provider with little name recognition". Accipiter could not have been the key competitive concern of Cox in Vistancia.

(4) Qwest and Cox have a history of competition in master planned developments. Qwest was the key competitive concern for Cox.

(5) Cox chose to participate with Vistancia's private easement arrangement before Qwest decided to transfer its Vistancia service areas to Accipiter.

(6) Cox management was aware of the anti-competitive nature of discussions with Vistancia. No evidence has been presented that Cox management took corrective actions.

(7) Cox chose to accept the private easement arrangement. Cox had no obligation to accept the arrangement.

(8) Despite Cox's contention that it understood the private easement arrangement to be legal, Cox took steps to further indemnify Cox should Shea be sued by a third party.

Q. Any final observations about the Vistancia agreements?

A. The capital contribution changed from $2 Million without a License Fee to $3 Million with a License Fee of $1 Million but took an unusual path worth highlighting.

As illustrated in Exhibit AFF-26, Staff has found draft documents of the CMAs from as early as February 25, 2002 through January 17, 2003. All documents during this period contain the $2 Million figure without a $1 Million payment to Vistancia in Exhibit G of the CMA. Consistent with the testimony of Cox witnesses[30], Staff found a template

[30] Direct Testimony Of Linda Trickey, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, April 5, 2006, pages 2 - 3; Direct Testimony Of Tisha Christle, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, April 5, 2006, pages 10 – 11.

NELA (Exhibit AFF-27) from December 23, 2002 that may have been used by Vistancia and Cox as discussions for a License Fee began in late 2002. Exhibit AFF-26 highlights a series of REDACTED emails beginning January 22, 2003 through January 29, 2003. REDACTED These figures remained unchanged in the CMA signed on April 8, 2003, the Revised CMA signed on September 23, 2003 and the NELA-CMA signed on December 31, 2003. The most informative emails, as noted earlier in this testimony (AFF-11, AFF-12, AFF-13 & AFF-14), may well be those that occur between the period immediately following the REDACTED emails and the emergence of the revised CMA with the $3 Million payment to Cox and a $1 Million payment to Vistancia.

Q. What is the relevance of this point?

A. Cox asked for a $2 Million capital contribution and eventually received a $3 Million capital contribution while returning $1 Million in license fees to Vistancia. The figures net to $2 Million as originally requested, meaning that **Cox did not have to pay the $1 Million license fee that other carriers would have been required to pay**. As illustrated by Exhibit AFF-11 – "Sunbelt gives us $5 Million and we give back $3 Million to keep out the competition" – the Capital Contribution and License Fee elements could have been just about any figures as long as the net amount was a $2 Million payment to Cox.

Q. Was Cox upper management aware of the anti-competitive behavior?

A. Yes. A point that cannot be ignored is that several members of what Staff considers to be "upper management" were informed about the content of the agreements with Vistancia.

Q. Please summarize Staff's conclusion regarding the three categories of anti-competitive behavior analyzed by Staff?

A. (1) Did Cox support anti-competitive barriers to telecommunications entry in Vistancia? Yes, Staff believes that Cox did more than support anti-competitive barriers. Cox was an active participant.

(2) What was Cox management's role in the development of agreements used in Vistancia? Cox management was well-informed, helped amend the agreements and understood its participation in Vistancia.

(3) What was the objective of Cox's behavior in Vistancia? The evidence suggests that Cox intended to keep Vistancia itself from creating a CLEC and serving the Vistancia development without Cox and intended to keep Qwest and other CLECs from competing in Vistancia.

Q. Does this conclude yourTestimony?

A. Yes, it does.

EXHIBITS

AFF-1	Vistancia Timeline
AFF-2	List of Planned Developments
AFF-3	Vistancia Location Map
AFF-4	C01784 – 11/25/03: Handwritten note regarding "doing 623 in 928 and getting hand slapped later"
AFF-5	Vistancia and Rancho Sahuarita Location Map
AFF-6	C01253 – 7/08/02: Handwritten note regarding Qwest capital requirements
AFF-7	C01258 – 7/8/02: Handwritten note regarding Qwest capital requirements
AFF-8	C00326 – REDACTED
AFF-9	C01377 – 9/06/02: Email regarding $2M capital contribution
AFF-10	CX04282 – 9/08/02: Email regarding $2M capital contribution
AFF-11	C01769 – 2/13/03: Handwritten note re "$3M to lock out the competition"
AFF-12	C01770 – 2/13/03: Handwritten note re $2M capital contribution
AFF-13	C01853 – 2/18/03: Email regarding "creative ways to keep the competition out"
AFF-14	C01261 – 2/24/03: Handwritten note regarding "$3M…to build barrier…"
AFF-15	CX07242 – REDACTED
AFF-17	CX06578 – 5/27/03: Email from Lesa Storey to Cox regarding right of approval for CSER
AFF-18	C00001 – 7/16/03: Email regarding "…Qwest and another carrier…"
AFF-19	C01773 – 10/8/02: Handwritten note regarding "Shea can guarantee to keep out the competition."
AFF-20	CX05963 – REDACTED
AFF-21	Cox Employees Involved in Vistancia (from DR9)
AFF-22	C02978, C02979 – REDACTED
AFF-24	C01256 – 9/16/02: Handwritten note about Shea looking into CLEC license
AFF-25	CX11140 – 4/9/03: Email from Business Development Director
AFF-26	CMA Timeline
AFF-27	C01655, C01664: Email and Template for Non-Exclusive License Agreement
AFF-28	C01655, C01656, C01675: Emails and CSER information regarding Indiana
AFF-29	May 20, 2005: Docket No. T-03471A-05-0064, "Staff Response Regarding Accipiter Complaint, Cox Telcom Motion to Dismiss, and Vistancia Communications, LLC, and Shea Sunbelt LLC Jurisdictional Allegations"
AFF-30	C00002: Email explaining private easement benefit

REDACTED

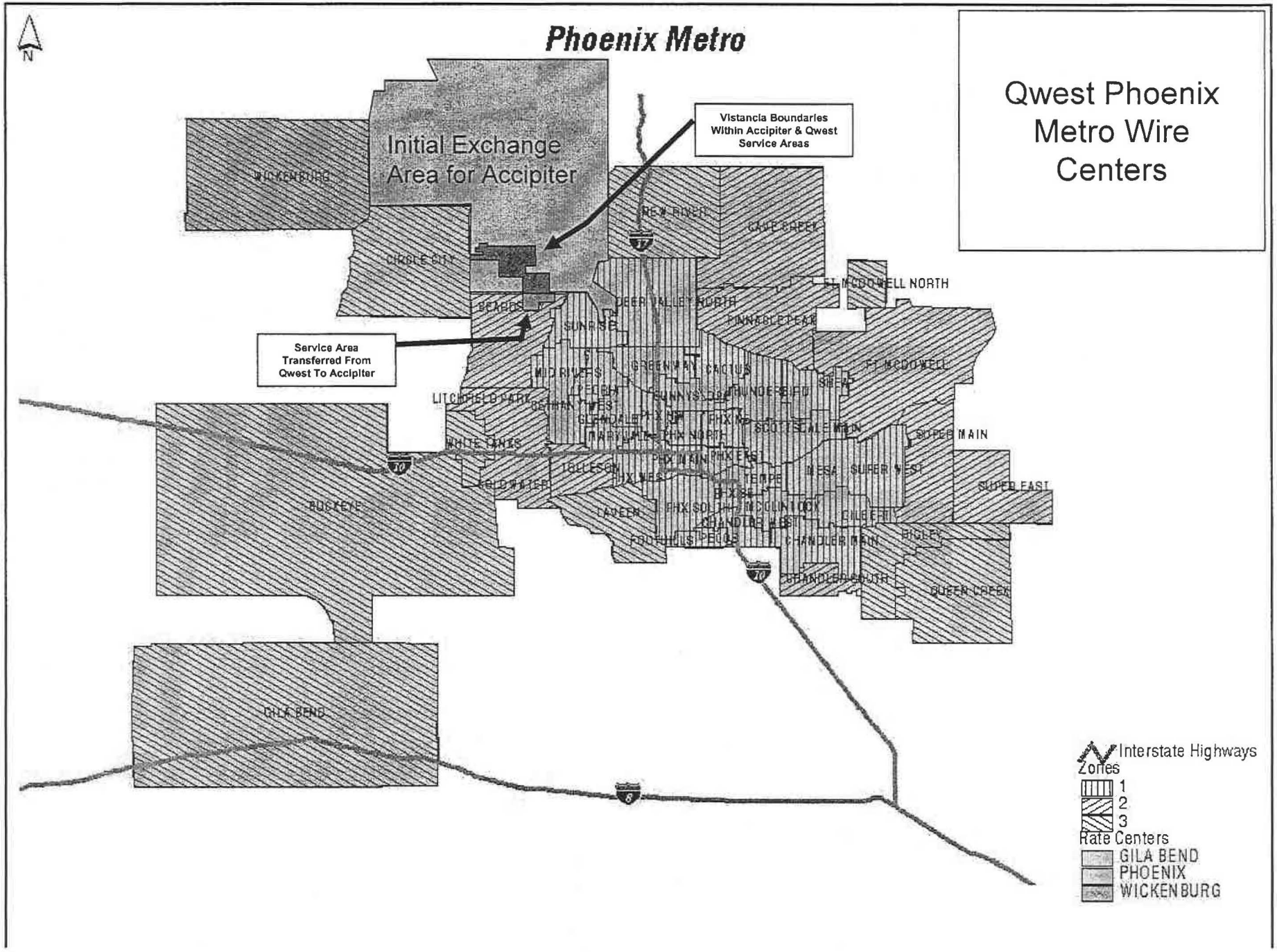
REDACTED

AFF-2

DEVELOPMENTS

Altamonte	Rancho Sahuarita
Anthem	Riverbend
Aviano	Salerno Ranch
Barrio Escalante	San Vicente
Bell Pointe	Savannah
Bell West Ranch	Seville
Boulder Mountain	Sheely Farms
Canyon Trails	Sierra Verde
Cave Creek Villas	Sonoran Foothills
Centerra	Sonoran Mountain Ranch
Central Park	Sonoran Ridge Estates
Chaparrral Estates West	Southern Views
Coldwater Springs	Spencer Place
Colonia Real	Springfield Lakes
Cooley Site	Sun City Festival
Cooley Station	Sun Groves
Cooper Leaf	Surprise Farms
Cortessa	Sycamore Canyon
Desert Oasis	Tartessa
Dove Cove	Tartesso
Dynamite Mountain Ranch	Tartesso West
Eagle Bluff	Terramar
Fiesta Court	The Spectrum
Floriana	Thompson Ranch
Foothills Paseo	Tivoli @ Augusta Ranch
Glenhurst	Tramanto
La Fortina	Tre Bellavia
Laveen Meadows	Tre Collina
Laveen Village	Treviso
Links @ Coyote Wash	Trilogy
Madera Highland	Val Vista Classic
Marley Park	Valencia
Mountain West Estates	Verrado
Paradise Vistas	Via Cita
Pebble Creek	Vista Dorada
Peterson Farms	Vistancia
Power Ranch	Westwing Mountain
Presidio in the Pines	Whetstone Ranch
Rancho Del Ray	Wigwam Creek

AFF-3


Phoenix Metro
Qwest Phoenix Metro Wire Centers
Initial Exchange Area for Accipiter
Vistancia Boundaries Within Accipiter & Qwest Service Areas
Service Area Transferred From Qwest To Accipiter
WICKENBURG
CIRCLE CITY
BEARDS
NEW RIVER
CAVE CREEK
DEER VALLEY NORTH
SUNRISE
PINNACLE PEAK
FT MCDOWELL NORTH
FT MCDOWELL
GREENWAY
CACTUS
MID RIVERS
PECOS
SUNNYSLOPE
PHX NE
SCOTTSDALE MAIN
LITCHFIELD PARK
GLENDALE
PHX NW
PHX NORTH
WHITE TANKS
PHX MAIN
PHX EAST
SUPER MAIN
TOLLESON
PHX WEST
TEMPE
MESA
SUPER WEST
SUPER EAST
BUCKEYE
GOODYEAR
PHX SOUTH
MCCLINTOCK
CHANDLER WEST
GILBERT
FOOTHILLS
PECOS
CHANDLER MAIN
RIGLEY
CHANDLER SOUTH
QUEEN CREEK
GILA BEND
Interstate Highways
Zones
1
2
3
Rate Centers
GILA BEND
PHOENIX
WICKENBURG

AFF-4

81 days to open 11/25/03
December - TV Teddie buys

When advertising CDC - make sure language does not separate out other CDC communities

Get w/Brian about tomorrow's meeting w/Seabelt

- Early January for training the Trilogy Sales group.

- all 3 services on move-in / Sales rep (builder) takes the order and sends to Cox so homebuyer doesn't have to. Cox to follow up after the fact.

Bob Williams General Sales Manager

623/928 will need to be noted in COMS so the person taking order knows.

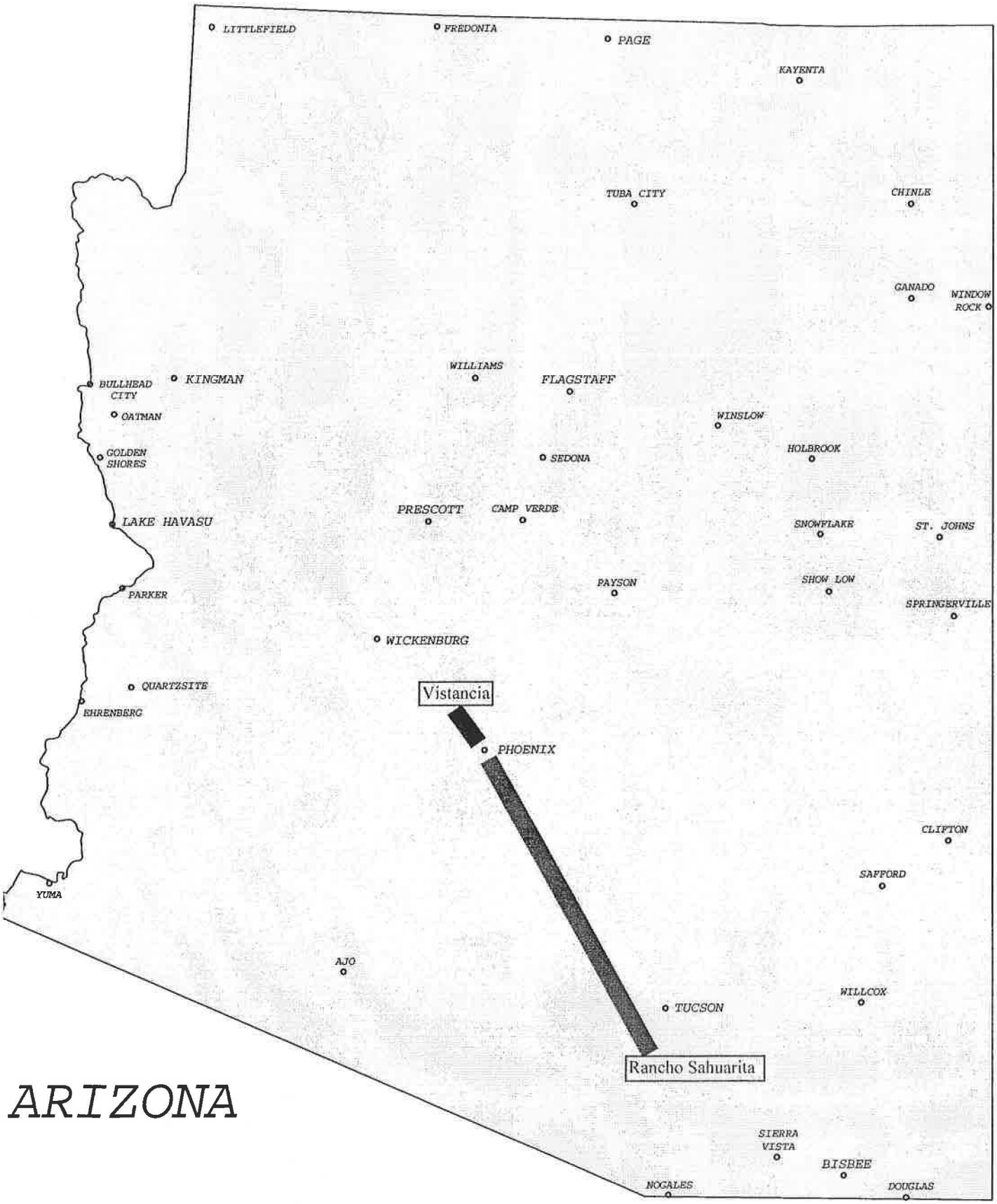
Ask Mark D. Nunzio about doing 623 in 928 and getting hand slapped later.

[redacted]

C01784

[redacted]

AFF-5



Notes:
- Vistancia is assumed to be zip code 85383, NW of central Phoenix
- Rancho Sahuarita is assumed to be zip code 85629, South of Tucson
- All Cox telecommunications, voice, end-offices are in Phoenix metro

AFF-6

7/8/02

Pleasant Point - Lake Pleasant
- Shea & Sunbelt

40 K. residents
5 schools

models June Q3

* Q4 of 2003
homes Ready
Sales Q1 of 2003
Pre-Sales

Dixileta cut off
{ Quest
ASipiter (Rob Richard)
own
Franchise of
Communications

→ Quest is requiring Capital costs
S of Dixileta but they
will give the rights to
Asipter if forced to build.

3-5 million

City of Peoria (15 yrs)

1,000 / year (750), 1,200 / year

→ Lakeland Village 1st - Anthem experience
White peaks Ranch 2nd

Jeff McGuire VP Finance

Time Charge & Local Charges
→ 602, 480 & 623

→ will not do bulk per Sunbelt
Az. Dept. of Real Estate

Commercial 2005 { Venanta 2006

[redacted]

C01253 [redacted]

AFF-7

SHEA HOMES 7/8/02

Pleasant Homes (Point).

- Customer move-in 2003.
- Qwest 1/3 franchise required.
- Reciprotere 2/3 franchise
- Qwest not willing to extend network.
- Buildout 1000 ± 250 /year (15 yrs buildout)
  - Two parcels included Village (9350 units) 4360 MDU units). + 4 Schools
- SHea looking for providers who can service all products.
- No homeowner association billing of any products.
- Commercial 2005-2006.
- Jeff McQueen - VP finance.
- Business Decision by end of July.
  a) Cox (Qwest & Cox not attached).
  b) Do our thing.

3-5 million

SheaHomes
For Active Adults

Byron Augustine
Director Information Technology

8800 N. Gainey Center Drive
Suite 350
Scottsdale, Arizona 85258

phone: 480-367-3714
mobile: 602-448-6221
fax: 480-948-0738

byron.augustinc@sheahomes.com

C01258

REDACTED

AFF-9

From: Drake, Paul (CCI-Phoenix)
Sent: 9/6/2002 4:42:01 PM (Eastern Time)
To: Arthurs, Tisha (CCI-Phoenix); Salk, Bill (CCI-Phoenix); Dougall, Herb (CCI-Phoenix); Carter, Robert (CCI-Phoenix); Sjostrom, Dan (CCI-Phoenix)
CC: Crosby, Sheila (CCI-Phoenix); Kirk, Percy (CCI-Phoenix); Carter, Kris (CCI-Phoenix)
Attachments: Cox follow-up.doc
Subject: FW: Meeting on Monday

Ladies and Gentleman,

After many changes to scheduling, we have finally coordinated a meeting with the principles from Shea Homes to finalize our proposal to serve the Pleasant Point master planned development, now called Vistancia. In doing so, Byron Augustine, their Director of Information Technology has provided a list of items they would like to have answered and/or discussed in Monday's meeting. In that the majority of these questions are far beyond the scope of NBD to negotiate/discuss, it is imperative that we have both your input as well as attendance at the meeting on Monday Sept. 9th.

Just to give you a sense of where we are with Shea on this significant West Valley project, the offer that was presented to them was we would provide all services to the development, based on two conditions. One, they would enter into an exclusive marketing agreement gaining high visibility/presence of Cox in the project and Two, provide a $2 million capital contribution. They have tentatively accepted the offer and this meeting is to enter into negotiations to finalize the agreement and provide them additional details on what we can provide.

Please let either myself, Tisha or Kris know your availability or your designate for the meeting as soon as possible.

Thank you

Paul Drake
Director, New Business Development
Cox Communications
(623) 322-7802

-----Original Message-----
From: Byron Augustine [mailto:byron.augustine@jfshea.com]
Sent: Friday, September 06, 2002 1:04 PM
To: Drake, Paul (CCI-Phoenix)
Subject: Meeting on Monday

Hi Paul, I understand that we are all confirmed for Monday next week. In updating the team on current progress this past week we also put together a brief list of items we would like to discuss or have answered during our meeting. I know you may not be able to get answers or info regarding all the questions before we meet because of the late request, but any of the info you can provide Monday would be greatly appreciated. Please let me know if you have any questions or need help with directions on Monday. <<Cox follow-up.doc>>

[redacted]

C01377

[redacted]

AFF-10

Crosby, Sheila (CCI-Phoenix)

From: Drake, Paul (CCI-Phoenix)
Sent: Sunday, September 08, 2002 5:00 PM
To: Hooper, Michael (CR-Phoenix)
Cc: Arthurs, Tisha (CCI-Phoenix); Crosby, Sheila (CCI-Phoenix)
Subject: Vistancia by Shea Homes

Michael,

We have a huge opportunity to partner with Shea Homes on a 14,000 unit master planned community just south of Lake Pleasant in Peoria. Shea will become a partner with Cox and our Cox Digital Community builder program through an exclusive marketing agreement that will give us extensive visibility in the model and home finding complexes. This will be the first opportunity we have had to partner with Shea. They are looking to advancing a capital contribution of approx. $2 million just to be sure we have our services there at first move-in.

In the past Cable Rep and Cox have partnered in allowing us to include information about Cable Rep in our presentations allowing the opportunity for our builder partners to receive "partner discounts" for advertising, those discounts being determined by your team based on the value of the opportunity, project, etc. What I would like to ask of you is if we can make the same presentation to Shea to further enhance our proposal and the partnership that will come with Cox and Cable Rep as partners. We are meeting with the principles on Monday 9/9, and if they are favorable about the opportunity, we could facilitate a meeting with your team and Shea to move forward in discussion of the opportunity.

Let me know your thoughts. It would be great if we could partner on this opportunity.

Thanks for your consideration.

Paul Drake
Director, New Business Development
Cox Communications
(623) 322-7802

[redacted]

[redacted]

AFF-11

SunBelt Holdings 2/13/03
Curt, Mark, Paul, Me

Be sure to have Kenny notify me if we run into any roadblocks w/ ADOT, City of Peoria etc.

SunBelt gives us $5 Million and we give them back $3 Million to keep out the competition.

Access Entity about ready. "Namewise"

X Set meeting w/ Dan + Howard for Tuesday.

2/18/03
Howard Dan
Paul Me

What are we missing. They are giving us an 11% interest free loan.

Howard feels we should proceed with legal overseeing.

[redacted]

C01769

[redacted]

AFF-12

1.

Residential

1. City of Peoria in place of Maricopa

2. Term ~~15~~ yrs not 25 15 years w/ 15 year automatic renewal no discretion to terminate. Project will be 25 yrs plus build out. *Paul suggest 20yr. 5yr. renewal* Surprise Farms 1/3 the size with 25yr. Term
Talk to Dan
20 yrs 5 yr auto renew

3. Paragraph 46
Transferrance - Shea pays upfront capital & does not want to money transferring
Cox can tie to Master HOA. Shea Sunbelt will provide copy.
Change copy to "Cox Shall" not "Cox may"
~~H~~ model home complex at the project info center

4. 50 - how do we incorporate the compensation schedule
Call Mark

5. 6E - no backbone discussion only drops
Beef up timley & effective manner language

6. ~~B~~ 11A - Shea wants a provision to protect them from us walking away after a year w/ the $2 million capital contribution
get Dan's view on payback if we stop servicing - check w/ Jennifer
franchise driven

[redacted]

C01770

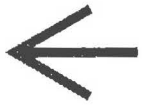
[redacted]

AFF-13

Sjostrom, Dan (CCI-Phoenix)

Subject:	Vistancia capital contribution
Location:	Howard's office
Start:	Tue 2/18/2003 10:00 AM
End:	Tue 2/18/2003 11:00 AM
Recurrence:	(none)
Meeting Status:	Accepted
Required Attendees:	Arthurs, Tisha (CCI-Phoenix); Drake, Paul (CCI-Phoenix); Tigerman, Howard (CCI-Phoenix); Sjostrom, Dan (CCI-Phoenix)

Paul and I met with Sunbelt Holdings today and they are giving us some pretty creative ways to keep the competition out. From a financial stand point we need your input.



[redacted]

[redacted]

AFF-14

VISTANCIA MEETING 02-24-03

•$3 million cost to build berms for new project access.

REDACTED

AFF-17

Harris, Paezle (CCI-Atlanta)

From: Lesa J. Storey [lstorey@sbplc.com]

Sent: Tuesday, May 27, 2003 10:21 PM

To: Trickey, Linda (CCI-Atlanta); Kelley, Mary (CCI-Phoenix); Arthurs, Tisha (CCI-Phoenix)

Cc: Curt Smith (csmith@sunbeltholdings.com); Mark Hammons (mhammons@sunbeltholdings.com)

Subject: Vistancia; CSER

Attachments: ESM_JM_5 CSER Final with Exhibits (05-27-03).pdf; DVComparison_ESM_JM_4 CommonServicesEasementsandRestrictions(Vistancia telecom) (03-24-03)-ESM_JM_5 CommonServicesEasementsandRestrictions(Vistancia telecom) (05-27-03).doc; DVComparison_EXH_JM_4 AppendixA-DefinitionsandInterpretations(Vistancia telecom)(03-24-03)-EXH_JM_5 AppendixA-DefinitionsandInterpretations(Vistancia telecom)(05-27-03).doc

Ladies,

Curt Smith requested that I forward to you the attached documents, consisting of the following:

1) Final version of the "CSER" document, with all Exhibits attached (note: the Exhibit A property initially being subjected to the CSER describes the parcels that make up Village A and Trilogy);

2) Redlined copy of the CSER document, showing changes to the last version that you reviewed (dated 3-24-03) (as you will see, all of the changes are of a "clean-up" variety); and

3) Redlined copy of Appendix A to the CSER, showing changes to the last version that you reviewed (dated 3-24-03) (again, all of the changes are of a "clean-up" variety).

We are delivering these documents to you because, under the terms of the Co-Marketing Agreement for Vistancia, Cox has the right to review and approve the CSER prior to recording it. We would like to record the CSER before the end of this week, so if you could get back to us with your approval (or comments, if any) before then, we would greatly appreciate it.

Thanks much,

Lesa J. Storey
Storey & Burnham PLC
3030 E. Camelback Road
Suite 265
Phoenix, AZ 85016
Main Line: (602) 468-0111
Direct Line: (602) 522-0202
Fax Line: (602) 468-1335
email: lstorey@sbplc.com

<<ESM_JM_5 CSER Final with Exhibits (05-27-03).pdf>> <<DVComparison_ESM_JM_4 CommonServicesEasementsandRestrictions(Vistancia telecom) (03-24-03)-ESM_JM_5 CommonServicesEasementsandRestrictions(Vistancia telecom) (05-27-03).doc>> <<DVComparison_EXH_JM_4 AppendixA-DefinitionsandInterpretations(Vistancia telecom)(03-24-03)-EXH_JM_5 AppendixA-DefinitionsandInterpretations(Vistancia telecom)(05-27-03).doc>>

3/17/2005

[redacted]

[redacted]

AFF-18

DiNunzio, Mark (CCI-Phoenix)

From: DiNunzio, Mark (CCI-Phoenix)
Sent: Wednesday, July 16, 2003 3 07 PM
To: Kelley, Mary (CCI-Phoenix), Arthurs, Tisha (CCI-Phoenix)
Subject: Vistancia Contract

Did either of you have any problems with the way the developer negotiated use of the easements for Vistancia? My understanding is that Qwest and another carrier are fighting the way the developer wanted to negotiate the use of the easement I know we are the preferred provider for this area but just wanted to know if we had a problem with this too or were able to accept it since we landed the contract If we did have a problem with it, please let me know as it could set a precedent for other areas we may want to serve Thanks

Mark A. DiNunzio
Manager, Regulatory Affairs
Office - 623-322-8006
Fax - 623-322-8037
Cell - 602-741-3740
mark.dinunzio@cox.com

Vistancia 10/8/02

Byron	Franklin
Curt	Dan
Rick	Paul
Mark	Sheila

Add 5 wks to Negotiating

Options:
Qwest gave up their franchise by the corporation commission to Incopator, who can only provide phone.

Shea can guarantee to keep out competition, Cox can purchase the knowledge. What is it worth to us.

Shea is very adamant about seeing our models Franklin committing to look at their return of $2 million

Shea wants to know what they are going to make

[redacted]

REDACTED

AFF-21
1 of 2

Cox Arizona Telcom, LLC's
Responses To Staff's 9th Set Of Data Requests
Docket No. T-03481A-05-0064
March 22, 2006

First Name	Last Name	Location	Title
Tisha	Arthurs	Phoenix	Senior Account Executive
Delynn	Ball	Phoenix	Team Leader Dispatch
Meredith	Barnes	Phoenix	No longer with Cox
Donald	Belina	Phoenix	Manager- Engineering Support
Shannon	Boyle	Phoenix	Manager – New Business Development MDUs
Janson	Burgess	Phoenix	Team Manager RF Design
Robert	Carter	Phoenix	No longer with Cox
Don	Civalier	Phoenix	MTC Engineer
Tisha	Christle	Phoenix	Same as Tisha Arthurs (married name)
Sheila	Crosby	Phoenix	VP Sales
Monica	Dahmen	Atlanta	LNP Manager
Cindi	Deschane	Phoenix	Team Manager – Test desk
Mark	DiNunzio	Phoenix	Director, Regulatory Affairs
Paul	Drake	Phoenix	No longer with Cox
Patrick	Dryer	Phoenix	Manager New Business Development
Don	Durland	Phoenix	Network Ops Tech I
Aimee	Eiselstein	Phoenix	Temp
Douglas	Garrett	Emeryville	VP, Regulatory Affairs
Jennifer	Gilbert	Phoenix	Account Support Manager
Sandar	Gore	Atlanta	Code Administrator
Kenneth	Gosney	Phoenix	Project Coordinator I
Jim	Grieco	Phoenix	No longer with Cox
Don	Guthrie	Phoenix	Field Estimator
LeAnn	Hanko	Phoenix	Department Coordinator
Paezle	Harris	Atlanta	Senior Paralegal
Yvonne	Hayes	Atlanta	Senior Paralegal
Kenny	Hensman	Phoenix	Field Estimator
Jennifer	Hightowner	Atlanta	Assistant General Counsel
Yvonne	Hitchcock-Dozer	Phoenix	Account Executive
Heather	Housen	Atlanta	Senior Paralegal
Nichele	Johnson	Phoenix	Marketing Specialist III
Denise	Johnson-Davis	Atlanta	Subpoena Coordinator
Mary	Kelley	Phoenix	No longer with Cox
Percy	Kirk	Phoenix	General Manager Omaha System
Rob	Mayer	Phoenix	Team Leader – Commercial Field Engineer
Natasha	Mays	Atlanta	Code Administrator
Bryan	McIntyre	Phoenix	Manager – Field Engineering
Dan	Myers	Phoenix	Director Engineering Project Management & Design
Julia	North	Phoenix	No longer with Cox
Jerry	Nowicki	Phoenix	Director Construction Services
Kamaree	Odom	Atlanta	Number/Code Administrator
Andrea	Olson	Phoenix	SOC Specialist III
Dick	Purser	Atlanta	Director – Transport and Interconnection
J. Steve	Rizley	Phoenix	GM and Region Manger – Cox Arizona
Bill	Salk	Phoenix	Director MTC Engineering and Ops
Dale	Scott	Phoenix	Data Analyst - TMC
Dan	Sjostrom	Phoenix	No longer with Cox
Nolan	Straabe	Phoenix	No longer with Cox
Frank	Thornton	Phoenix	No longer with Cox
Howard	Tigerman	Phoenix	VP, Business Operations
Linda	Trickey	Atlanta	Senior Counsel
Mike	Tucker	Phoenis	No longer with Cox

Cox Arizona Telcom, LLC's
Responses To Staff's 9th Set Of Data Requests
Docket No. T-03481A-05-0064
March 22, 2006

	Marvel	Vigil	Emeryville	VP, Exchange Carrier
	Franklin	Vincent	Phoenix	VP Finance – New Orleans system
	Laurie	Waddle	Phoenix	Team Leader Test Desk
	Jeffrey	Walker	Phoenix	No longer with Cox

RESPONDENT: Mark DiNunzio
Director, Regulatory Affairs

REDACTED

REDACTED

AFF-24

9/16 - Vistancia - Pleasant Point
Shea Development (40K Residents
Sun Belt Holdings) (5 schools
750/1 year - 15 yrs
16 mil 4 ft. ← Commercial 2005 - occupied 2006
Lakeland Village 1st
White peaks Ranch 2nd
models June 03
Q4, 03 Homes ready
Q1 - pre-Sales

(1) 2 mil cap - Exclusive
(2) 3 mil cap - non-Exclusive
(3) Franchise Req. - no phone

people
Rick Andrine - Shea
Kurt Smith ~ Surprise Farms
John Graham - Sunbelt
(Sept 27th)

(1) - Revenue Share
(2) - Commercial properties
(3) - one contract w/ commercial

C.L.E.C. license - Looking into currently

? * they will still need Quest or Cox to connect

- multiple HOA's - could be diff. Builds potentially

[redacted]

C01256

[redacted]

AFF-25

From: Drake, Paul (CCI-Phoenix)
Sent: Wednesday, April 09, 2003 4:18 PM
To: CCI PHX - Senior Team; Hedlund, Kristi (CCI-Phoenix)
Cc: Salk, Bill (CCI-Phoenix); Vincent, Franklin (CCI-Phoenix); Kelley, Mary (CCI-Phoenix); Sjostrom, Dan (CCI-Phoenix); Trickey, Linda (CCI-Atlanta); Ahern, Kevin (CCI-Phoenix); Arthurs, Tisha (CCI-Phoenix); Carter, Kris (CCI-Phoenix); Kendle, Nick (CCI-Phoenix); Rolland, Randy (CCI-Phoenix)
Subject: Vistancia Master Planned Development

New Business Development is proud to announce the delivery of one of the largest master planned developments we have secured through our ***Cox Digital Community*** exclusive marketing program, that has taken the name of Vistancia. The parents, Sunbelt Holdings/Shea/Vistancia LLC and Cox Communications are very proud of the partnership that has been formed. Although labor didn't take as long as our recent Verrado negotiations, the 6 month process secured exclusivity of all Cox products to 17,000 R-1 units and service access to 6 million square feet of commercial opportunities. The biggest part of the overall negotiations was our ability to secure a ***$3 million dollar capital contribution*** which will be paid to support our infrastructure costs, allowing the opportunity for the system to utilize capital elsewhere to increase our customer base.

Construction on the development, located south of Lake Pleasant along the new extension of the SR 303, has already begun with grading and excavating. Model completion is estimated to be the first part of December '03, with first move-ins expected May '04. Build out rate is expected to be 1200 units per year. Shea Homes will be the primary builder with allocated parcels to other builders as the project moves forward.

I would like to take this opportunity to thank all those who have worked on this very significant project. **Bill Salk and his engineering team** for the numerous estimates needed. **Franklin Vincent and Dan Sjostrom** for developing the business model that assisted us in being able to secure this project. **Linda Trickey** in Corporate Legal for the long hours of review of the agreement drafts. And last but certainly not least, the forward team on this project who took it from it's inception to conclusion, **Mary Kelley and Tisha Arthurs** for the countless hours in back and forth negotiations with the client on the multitude of deal points and contract changes required to secure this project. Without their constant focus on this project, we would still be in negotiations for quite sometime. Definitely a team effort.

As with DMB and Verrado, this is a very significant partnership for Cox. Sunbelt and Shea are possibly the largest master planned developers in the southwest. Their projects include Power Ranch and Seville to name just a few. We are confident that through this exclusive agreement, we will be able to further our partnership to secure future projects, capitalizing on the success of Vistancia for both Cox and Sunbelt/Shea.

Again, our thanks to all who are a significant part of this success story.

Paul Drake

Business Development
Cox Business Services
(623) 322-7802

[redacted]

CX11140

[redacted]

AFF-26

REDACTED

AFF-27
1 of 2

From: Mark Hammons [mhammons@sunbeltholdings.com]
Sent: Monday, December 23, 2002 5:37 PM
To: Drake, Paul (CCI-Phoenix); Arthurs, Tisha (CCI-Phoenix)
Subject: Vistancia



CommonServicesEaNon-ExclusiveLicensAppendixA-Definitio
sementsandRest... eAgreement(... nsandInterp...

Here are the remaining documents described in my previous email. The following is our attorneys contact information

Joe Montel
Montel Law Firm, P.C.
(317) 569-1680 phone
(317) 569-1690 fax
jimmlf@ameritech.net

I look forward to your comments,

Mark <<CommonServicesEasementsandRestrictions(Vistancia) Version 2... 12-23-02.doc>> <<Non-ExclusiveLicenseAgreement(Vistancia) Version 2...12-23-02.doc>> <<AppendixA-DefinitionsandInterpretations(Vistancia) Version 2... 12-23-02.doc>>

[redacted]

C01655

[redacted]

Cross Reference

This instrument burdens real estate located in_____ County, State of _____. The original recorded plat that subdivided the burdened real estate was recorded in the office of the Recorder of_____ County as instrument number _____, the "Plat"). The real estate is also burdened by Common Services Easements and Restrictions which were recorded in the office of the Recorder of_____ County as Instrument Number_____. The last deed conveying the burdened real estate was recorded in the office of the Recorder of_____ County as Instrument Number _____.

NON-EXCLUSIVE LICENSE AGREEMENT

"Effective Date": December ____ ,2002

"Licensor": Corporate/Company Name:

State of Organization:

Address:

THIS NON-EXCLUSIVE LICENSE AGREEMENT (this "License") is made and entered into on the Effective Date by and between Licensor and Coxcom, Inc, a Delaware corporation d/b/a Cox Communications, 20401 North 29th Avenue, Phoenix, Arizona 85719 (the "Licensee"). Capitalized terms not otherwise defined in this License shall have the meanings ascribed to them in the Appendix A attached hereto and incorporated herein by reference. The terms or phrases "Effective Date", and "Licensor" shall have the meanings ascribed to them above.

ARTICLE I - RECITALS

Section 1.01 WHEREAS, Licensor is the "Grantee" under the Common Services Easements and Restrictions, and has not encumbered, alienated or otherwise transferred or diminished its rights thereunder, except as set forth on Schedule 1.01 attached hereto.

Section 1.02 WHEREAS, Licensor desires to grant Licensee, its grantees, successors and assigns an irrevocable license for the perpetual use of the Combined Easements and Reserved Rights conveyed to Licensor in the Common Services Easements and Restrictions, subject to the terms and limitations of this License.

Section 1.03 WHEREAS, in accordance with the Common Services Easements and Restrictions, Licensor desires to authorize Licensee to install, own and maintain Facilities within the Service Easement Area.

Section 1.04 WHEREAS, Licensee wishes to accept from Licensor the License as set forth below, subject to the terms and limitations of the License.

Section 1.05 WHEREAS, this License is a private right of contract and a grant of an irrevocable private license between Licensor and Licensee, and is not a grant of a public easement.

[redacted]

C01664

[redacted]

AFF-28
1 of 3

From: Mark Hammons [mhammons@sunbeltholdings.com]
Sent: Monday, December 23, 2002 5:37 PM
To: Drake, Paul (CCI-Phoenix); Arthurs, Tisha (CCI-Phoenix)
Subject: Vistancia



CommonServicesEasementsandRest... | Non-ExclusiveLicenseAgreement(... | AppendixA-DefinitionsandInterp...

Here are the remaining documents described in my previous email. The following is our attorneys contact information

Joe Montel
Montel Law Firm, P.C.
(317) 569-1680 phone
(317) 569-1690 fax
jimmlf@ameritech.net

Indiana area code

Ameritech email address

I look forward to your comments,

Mark <<CommonServicesEasementsandRestrictions(Vistancia) Version 2... 12-23-02.doc>> <<Non-ExclusiveLicenseAgreement(Vistancia) Version 2...12-23-02.doc>> <<AppendixA-DefinitionsandInterpretations(Vistancia) Version 2... 12-23-02.doc>>

[redacted]

C01655

[redacted]

Cross Reference

This instrument burdens real estate located in [insert] County, state of [insert]. The last deed conveying the burdened real estate was recorded in the office of the Recorder of [insert] County as Instrument Number [insert].

COMMON SERVICES EASEMENTS AND RESTRICTIONS

"Effective Date":	December ___, 2002	
"Grantor":	Corporate/Company Name:	Shea Sunbelt Pleasant Point, LLC
	State of Organization:	Delaware
	Address:	6720 North Scottsdale Road Suite 160 Scottsdale, Arizona 85253
"Grantee":	Company Name:	
	State of Organization:	
	Address:	

THIS COMMON SERVICES EASEMENTS AND RESTRICTIONS (this "Easement") is made and entered into on the Effective Date by and among the Grantor and the Grantee. Capitalized terms not otherwise defined in this Easement shall have the meanings ascribed to them in Appendix A attached hereto and by this reference incorporated in this Easement. The terms or phrases "Effective Date", "Grantor" and "Grantee" shall have the meanings ascribed to them above.

ARTICLE I - RECITALS

Section 1.01. WHEREAS, Grantor is, and at all relevant times has been, the fee simple title owner of the Development.

Section 1.02. WHEREAS, Grantor wishes to grant to Grantee the perpetual and exclusive private easements set forth below, subject only to the terms and limitations of this Easement.

Section 1.03. WHEREAS, Grantor represents and warrants to the Grantee that Grantor is, and at all relevant times has been, the true and lawful owner of the Development; and, that Grantor has the full right and power to grant and convey the rights set forth in this Easement.

Section 1.04. WHEREAS, Grantee desires the private and personal grant of an In Gross Easement over and across the Development, privately and personally vesting in Grantee the exclusive and perpetual right to identify and privately contract with Common Service Providers for the use of the In Gross Easement Area.

[redacted]

[redacted]

Definitive Documents will be binding upon the Parties, or have any force or effect whatsoever. Any prior agreements, promises, negotiations, or representations concerning the subject matter of the Definitive Documents which are not expressly set forth herein or therein are of no force or effect.

Section 2.02 Amendment or Alteration. The agreement which incorporates this Appendix A may be altered or amended in whole or in part, at any time. Amendments or alterations must take the form of a written instrument setting forth the amendments or alterations, which written instrument must be signed by all Parties thereto.

Section 2.03 Severability. If any covenant, agreement, term or provision of any agreement which incorporates this Appendix A is held to be illegal, invalid, unreasonable, or unenforceable under the present or future laws effective during the term thereof, such covenant, agreement, term or provision shall be fully severable. The agreement shall be construed and enforced as if such illegal, invalid, unreasonable, or unenforceable covenant, agreement, term or provision had never comprised a part thereof and, the remainder shall remain in full force and effect and shall not be affected by such illegal, invalid, unreasonable, or enforceable covenant, agreement, term or provision or by its severance therefrom. Furthermore, in lieu of the illegal, invalid, unreasonable, or unenforceable covenant, agreement, term or provision, there shall be added automatically a provision as similar in terms to such illegal, invalid, unreasonable, or unenforceable covenant, agreement, term or provision as may be possible and be legal, valid, reasonable, and enforceable.

Section 2.04 Waiver. No delay or failure by any Party in exercising any rights under any agreement which incorporates this Appendix A, and no partial or simple exercise of such rights, shall constitute a waiver of that or any other right.

Section 2.05 Governing Law. (i) Except as provided in Section 2.05(ii) below, any agreement which incorporates this Appendix A, including, without limitation, any controversy or claim arising out of or relating to the agreement which incorporates this Appendix A, or its breach, the construction of its terms, or the interpretation of the rights and duties of the Parties, shall be construed and governed exclusively according to the internal laws of the State of Arizona, without regard to that jurisdiction's law regarding conflicts of law. Except as provided in Section 2.05(ii) below, any agreement which incorporates this Appendix A shall be subject to the exclusive jurisdiction of Indiana state courts and of the federal courts with jurisdiction over Maricopa County, State of Arizona, regardless of the residence or situs of the Parties, to which jurisdiction of the court the Parties expressly submit, and waive objection thereto. Except as provided in Section 2.05(ii) below, any agreement which incorporates this Appendix A shall be subject to, and litigated in, the exclusive and preferred venue of Arizona state courts located in Maricopa County, State of Arizona or of the federal courts with jurisdiction over Maricopa County, State of Arizona. (ii) To the extent any state or federal law or regulation prohibits or restricts the provisions set forth in Section 2.05(i) above; then, the State of Arizona will be automatically replaced with the state wherein any real estate which is subject to any agreement which incorporates this Appendix A is situated, and Maricopa County will be automatically replaced with the county wherein any real estate which is subject to any agreement which incorporates this Appendix A is situated.

Section 2.06 Headings: Interpretation. All headings are inserted only for convenience and ease of reference and are not to be considered in the construction or interpretation of any provision hereof. The singular shall include the plural, and the masculine gender shall include the feminine and neuter, and *vice versa*, as the context requires. The term "including" shall mean "including, without limitation" or its equivalent whenever used herein and shall not limit the generality of any description preceding such term. The introductory paragraph and recitals set forth at the commencement of any agreement which incorporates this Appendix A shall form a part thereof. Reference to any Person includes such Person's successors and assigns but, if applicable, only if such successors and assigns are permitted by the agreement which incorporates this

[redacted]

[redacted]

ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
DOCUMENT CONTROL

Arizona Corporation Commission
DOCKETED
MAY 20 2005
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305R

COMMISSIONERS
JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

In the Matter of the Formal Complaint of Accipiter Communications, Inc. Against Vistancia Communications, LLC, Shea Sunbelt Pleasant Point, LLC and Cox Arizona Telcom, LLC.	Docket No. T-03471A-05-0064

AFF-29
1 of 32

Staff Response Regarding Accipiter Complaint, Cox Telcom Motion to Dismiss, and Vistancia Communications, LLC, and Shea Sunbelt LLC Jurisdictional Allegations
(Redacted)

I. Introduction

By Procedural Order dated May 2, 2005, Staff was required to respond to the legal arguments raised by Accipiter Communications Inc. ("Accipiter") in its Complaint, Cox Arizona Telcom, LLC ("Cox Telcom") in its Motion to Dismiss, and Vistancia Communications, LLC ("Vistancia Communications") and Shea Homes Southwest, Sunbelt Pleasant Point and Sunbelt Holdings Management (hereinafter collectively referred to as "Shea Sunbelt") in letters to the Commission stating that they will not participate in this Docket because the Commission lacks personal and subject matter jurisdiction over them. Following is Staff's response to the legal arguments presented by the parties.

There have been several cases under Arizona law which have involved developers and the issue of whether they crossed the line such that they were deemed to be acting as public service corporations. There have been still other cases under Arizona law which have examined a public utility's dealings with others and which have found that the Commission's authority in some limited instances must be interpreted broadly so that its authority necessarily encompasses transactions between public service corporations and entities that pose a threat to the Commission's ability to

protect the public. All of these very difficult issues are present in this case. The Developer and its affiliate, Vistancia Communications, CoxCom, and Cox Arizona Telcom have spun a complex web of contracts to generate significant revenue within the Vistancia Development for their own benefit while at the same time thwarting the provisions of state and federal laws which are designed to give customers choice and different options among service providers.

As discussed herein, the allegations presented so far by Accipiter support its argument that Vistancia Communications and Shea Sunbelt's virtually unlimited degree of control over the provision of telephone service to the Vistancia Development, brings them within the purview of Article XV, Section 2 of the Arizona Constitution and renders them public service corporations. Moreover, the allegations also suggest the existence of a joint venture between Vistancia Communications, Shea Sunbelt, Cox Telcom and CoxCom which is providing telephone service to residents of the Vistancia Development. If these entities are acting as public service corporations under Arizona law, a whole host of Commission rules, state statutes and federal laws are implicated.

Moreover, the circumstances of this case, again present a case where a public utility and its dealings with other entities not normally regulated by the Commission, are so intertwined that they cannot be practically separated for jurisdictional purposes. In this case, the parties' conduct goes to the heart of the Commission's ability to effectively carry out its responsibilities under State and Federal law. The conduct of these entities is interfering with the Commission's orders, affecting the Commission's abilities to effectively regulate telecommunications services to the development, and is in direct contravention of state and federal laws governing public utility rights of way and policies promoting competition in the telecommunications markets.

II. Background

On January 31, 2005, Accipiter Communications, Inc. filed a formal Complaint with the Commission against Vistancia Communications, Shea Sunbelt and Cox Arizona Telcom. The Complaint involves the provision of service to a master planned development, called Vistancia located in Peoria, and alleges through nine (9) separate counts innumerable violations of Commission rules and enabling statutes by the three entities. According to Accipiter's Complaint, at build out the

Development will comprise some 17,000 homes with 45,000 residents. In Section III below, Staff will review the legal merits of each count.

According to Accipiter's Complaint, the Developer, Accipiter and Qwest had discussions regarding the provision of telecommunications services to the Development commencing in early 2002. The Developer, Shea Sunbelt, expressed a desire for one local exchange carrier to service the Vistancia community, and according to Accipiter's Complaint asked Accipiter and Qwest to work this out among themselves. Apparently, a portion of the development fell within Accipiter's service area and the other portion of the development fell within Qwest's service territory. Qwest ultimately agreed to transfer the Qwest sections of the development to Accipiter. The Commission approved this transfer in Decision No. 67574, which was entered on February 15,2005.

According to Cox Telcom's responses to Staffs data requests, CoxCom and Shea Sunbelt began negotiating service arrangements in mid-2002. Cox Telcom stated that the following documents set forth the arrangements between the parties: the Multi-Use Easement and Indemnity, the Common Services Easements and Restrictions agreement, the Non-Exclusive License Agreement [Co-Marketing Agreement], the Non-Exclusive License Agreement [Property Access Agreement], the Co-Marketing Agreement and the Property Access Agreement. The first four of these Agreements were attached to Accipiter's Complaint. The Co-Marketing Agreement and the Property Access Agreement were provided in response to Staff Data Request 1.21. In response to Staff data request 1.2, Cox Telcom stated that various Cox personnel were involved, either directly or indirectly, in negotiating and/or drafting the contracts and/or in approving the Vistancia agreements. In its response, Cox named approximately 15 employees that were involved in this process.

The significant terms and conditions of the six agreements are as follows. Under the Common Services Easement and Restrictions ("CSER')), Shea Sunbelt granted to Vistancia Communications a perpetual and exclusive private easement subject to certain terms and limitations. The easement is across designated portions of the Development and gives Vistancia Communications the exclusive and perpetual right to identify and privately contract with Communication Service Providers for the provision of Communications Services within the Development and the installation and maintenance of Facilities related thereto. In the CSER, Shea Sunbelt relinquishes and is

prohibited from granting any rights, permits, licenses, rights-of-way or easements over the In Gross Easement Area to any person which would permit or otherwise allow the establishment of any communication services or facilities for communication services on, over, under or across the In Gross Easement Area. The Service Easement is intended and shall be for the exclusive private and personal benefit of the grantee and its grantees, licensees, lessees, franchisees, successors and assigns who have been identified by and contracted with Vistancia Communications to provide Communication Services within the Development pursuant to the Easement.

Further, the grantor and grantees, licensees, lessees, franchisees, successors, and assigns, relinquish and are prohibited from granting rights, permits, licenses, rights-of-way and easements over the Service Easement Area to any person, or through an intermediary or third party, which would permit the establishment of any Communication Services or Facilities for Communications services on, over, under or across the Service Easement Area. In Section 2.03 of the CSER, the grantor agrees that due to the private, personal and exclusive nature of the grant conveyed in this Easement, no other Communication Services use of the Combined easement area shall be made by my person, including grantor and its grantees, licensees, lessees, franchisees, successors or assigns. Under Section 2.08 of the CSER, Vistancia Communications is to identify and provide access to a Mandatory Communication Service Provider. Vistancia Communications may supplement the list of Mandatory Communication Service Providers. If Vistancia Communications fails to identify and provide access to a Mandatory Communications Service Provider, the Developer and Owners have the ability to select an Alternative Mandatory Communications Service Provider.

Under Section 2.09 of the CSER, Vistancia Communications may terminate the exclusive arrangement with the Mandatory Communications Service Provider if in its opinion the services being provided are inadequate or too costly. The determination is to be made based upon like services available to the general area around the Development from third party Communication Service Providers. The charges are to be just and reasonable. A charge which is equal to, or less than, the standard, nonpromotional charge for like services shall be conclusively presumed reasonable and just. Section 2.09 states that for purposes of identifying a third party Communication Service Provider for Telephone Services (local), telephone services and charges shall be compared to

corresponding telephone services and charges of Qwest Communications. If at any time a determination is made that the service is inadequate or the rates unreasonable, the exclusivity of the contract terminates. Vistancia Communications may then designate another Mandatory Communications Service Provider subject to the same terms and conditions of the underlying agreements. Section 2.11 of the CSER states that the combined easement is not declared, created or granted for public or general utility use.

The second agreement between the parties is the Multi-Use Easements and Indemnity Agreement. ("MUEI"). The MUEI is between the Developer, Vistancia Communications ("the access entity") and the City of Peoria. The Agreement provides that the Plats to be recorded by the Developer will designate certain "Multi-Use Easements" which will be located adjacent to the streets and roadways dedicated on such Plats. Under Article II of the Agreement, the Access Entity will have the exclusive right to privately identify and privately contract with Communication Service Providers for (a) the provision of Communication Services within the MUEs and (b) the installation, establishment and maintenance of Facilities within the MUEs all in accordance with the CSER. Under Section 2.02, the City will be responsible for the issuance of permits for the construction and installation within the MUEs of Facilities for Communication Services pursuant to the same procedures under which the City issues permits for the construction and installation of facilities within the MUEs for gas, electric and other utility services other than Communications Services. Prior to the issuance of any Communication Facilities Permit, the City is to confirm with the Access Entity that the person or entity seeking such permit has been granted the right to construct and install the Communications Services Facilities for the which the permit is being sought. Under Article III, the Communications Service Provider must pay the City franchise fees.

The third agreement between the parties is the Non-Exclusive License Agreement ("NELA-CMA") dated December 31, 2003. The NELA-CMA is between Vistancia Communications and CoxCom d/b/a Cox Communications. Section 1.05 of the Agreement states that the License is a private right of contract and a grant of an irrevocable private license between the Licensor and Licensee and is not a grant of a public easement. Under Section 2.02, the License is irrevocable and continues perpetually. The rights and obligations granted to the Licensee may be assigned, sold,

transferred, sublicensed, encumbered or disposed of in any way, manner or extent at any time to any Person as authorized in the CMA, Section 13(c).[1] Under Section 3.01 of the NELA the Licensee agrees to pay the Licensor a fee calculated as a percentage of revenues. Under Sections 4.01 and 4.02 of the NELA, the Licensee agrees to indemnify and defend and hold harmless the Licensor and Grantor, the Owners and Association and to defend any controversy or claim arising out of or relating to this License or the CSER. Section 5.01 covers the payment of franchise fees.

The License Fees paid to Vistancia Communications are set out on Schedule 3.01:

> "The License Fee shall be paid and calculated as follows:
>
> Licensee shall pay Licensor the sum of Five Hundred Thousand and No/100 Dollars ($500,000.00) on or before ten (10) days after the date on which the first SFR or MFU within the Village A portion of the Development is connected to any Communication Service provided by Licensee.
>
> Licensee shall pay Licensor the sum of Five Hundred Thousand and No/100 Dollars ($500,000.00) on or before ten (10) days after the date on which the first SFR or MFU within the Village A portion of the Development is connected to any Communication Service provided by Licensee.
>
> Licensee shall pay Licensor a percent of revenue, according to the following scale, received by Licensee as hereinafter provided. The revenue will be paid on the incremental sales above 75% penetration. The penetration rate shall be calculated by dividing active customers by total homes passed. Penetration shall be calculated monthly and paid quarterly 90 days after the close of the quarter. This scale applies to Cable Television service, Local Telephone Service (excluding long distance), and Internet Access Service. It is exclusive of fees assessed for pay-per-view movies, long distance, installation fees, equipment fees whether purchased or rented, television guides, taxes, assessments and license fees.

Penetration	Payout
75%-79%	15%
80%-85%	16%
86%-90%	17%
90%-95%	18%
96%-100%	20%

> The License Fee shall be paid individually per product achieving 75% penetration. Each product must stand on its own merit in order to qualify for payment of the License Fee.

28 **BEGIN PROPRIETARY INFORMATION ********** END PROPRIETARY INFORMATION**

The fourth agreement is between Vistancia Communications and CoxCom d/b/a Cox Communications and is another Non-Exclusive License Agreement ("NELA-PAA") dated December 31,2003. The NELA-PAA is similar in wording to the NELA-CMA except it makes reference to the PAA agreement rather than the CMA agreement referenced in the NELA-CMA. It also has a different license fee schedule. Schedule 3.01 or the License Fee Schedule of this Agreement provides in part as follows:

> The License Fee shall be paid and calculated as follows:
>
> Licensee shall pay Licensor a License Fee according to the following scale based on the Applicable License Fee percentage (determined pursuant to the charge below according to the Penetration Percentage (as hereinafter defined) within each Building) multiplied by the Monthly Recurring Revenue (as hereinafter defined) for that Building. The License Fee shall be calculated (and paid by Licensee, if owed pursuant to the provisions of this Schedule 3.01) separately for each Building within Vistancia that is constructed on land conveyed by Master Developer to an Owner, which building is rented or occupied by an Owner, tenant or other occupant that subscribes to any Cox Communications Service (each such Building being hereinafter referred to as a "Qualifying Building"). As used herein, the term "Penetration Percentage" shall mean, with respect to each Qualifying Building, the percentage amount calculated by dividing the total square footage of the Qualifying Building that is rented or occupied by Owner(s), tenant(s) or other occupant(s) subscribing to Cox Communication Services, divided by the total rentable square footage of that Qualifying Building. For example, if a Qualifying Building contains 100,000 total rentable square feet and has Owners, tenants and other occupants subscribing to Cox Communication Services that occupy 85,000 square feet, then the Penetration Percentage would be equal to 85% and Licensor would receive a License Fee equal to 3% of MRC with respect to that Qualifying Building.

Penetration Percentage	Applicable License Fee
0%-74%	0% of MRC
75%-85%	3% of MRC
86%-95%	4% of MRC
96%-100%	5% of MRC

The fifth agreement between the parties is confidential. The agreement is between Vistancia Communications and CoxCom, and is entitled the Amended and Restated Co-Marketing Agreement ("CMA"). **BEGIN PROPRIETARY INFORMATION*******END PROPRIETARY INFORMATION**

The sixth and final agreement between the parties is the Amended and Restated Property Access Agreement ("PAA"). It is also a confidential agreement between Vistancia, LLC and

CoxCom. **BEGIN PROPRIETARY INFORMATION*********END PROPRIETARY INFORMATION**

111. Discussion

A. Accipiter's Complaint

1. Jurisdictional Counts

a. Count I of the Complaint: Accipiter Alleges that Vistancia Communications Is Acting as A Public Service Corporation Under Arizona Law Without a CC&N.

In Count 1 of its Complaint, Accipiter alleges that Vistancia Communications is acting as public service corporation without a CC&N. Vistancia Communications and Shea Sunbelt disagree. In several letters sent to the Commission, both entities have stated that they will not be participating in this case or responding to any Staff data requests because the Commission does not have jurisdiction over either entity, since neither entity is acting as a public service corporation.

Cox Telcom did not respond to the first two counts of Accipiter's complaint since they raised a jurisdictional issue with respect to Vistancia Communications and Shea Sunbelt only.

The facts in this case involve much more than a Preferred Provider Agreement between a developer and a telecommunications provider in a particular development in Arizona for the provision of telecommunications service. The facts involve the creation of a complex private easement scheme administered by Vistancia Communications for the sole purpose of generating profits and revenues and limiting the provision of telecommunications service providers to those that are willing to pay a significant access fee.

A public service corporation is defined in Article 15, Section 2, of the Arizona Constitution as:

> All corporations other than municipal engaged in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or engaged in collecting, transporting, treating, purifying and disposing of sewage through a system, for profit; **or in transmitting messages for furnishing public telegraph or telephone service,** and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations. (emphasis added).

In construing the term "public service corporation," courts have looked broadly at the purpose of Section 2. In *Van Dyke* v. *Geary*, the U.S. Supreme Court found that determining whether an entity

is a public service corporation under Article XV Section 2 depends on "the character of the service, that is, whether it is public or private." *VanDyke v. Geary,* 244 U.S. 39, 44 (1917) (emphasis added). *Van Dyke* relied on the well-known case of *Munn v. Illinois,* which held that "[p]roperty becomes clothed with a public interest when used in a manner to make it of public consequence and affect the community at large." *VanDyke,* 244 U.S. at 47, quoting *Munn v. Illinois,* 94 U.S. 113, 126 (1876).

In identifying those corporations "clothed with a public interest" and subject to regulation because they are "indispensable to large segments of our population," Arizona courts have often focused on the following factors set forth in *Natural Gas Service Co. v. Sew-Yu Cooperative:*

(1) What the corporation actually does
(2) A dedication to the public use
(3) Articles of incorporation, authorization, and purposes
(4) Dealing with the service of a commodity in which the public has been generally held to have an interest
(5) Monopolizing or intending to monopolize the territory with a public service commodity
(6) Acceptance of substantially all requests for service
(7) Service under contracts and reserving the right to discriminate is not always controlling
(8) Actual or potential competition with other corporations whose business is clothed with a public interest.

70 **Ariz.** 235, 237-238, 219 P.2d 324, 325-36 (1956). These eight factors are merely guides for analysis and they need not all be found to exist before the company in question may be deemed a public service corporation. *See Petrolane-Arizona Gas Serv. v. Arizona Corporation Commission,* 119 Ariz. at 257,259, 580 P.2d at 718,720 (1978).

(1) What the corporation actually does

This factor looks at the corporation's actual practices, rather than its stated intentions. The court in *Serv-Yu* noted that this factor points in favor of the corporation being a public service corporation when the corporation's service affects "so considerable a fraction of the public that it is public in the same sense in which any other may be called so...The public does not mean everybody all the time." *Serve-Yu,* 70 Ariz. at 240, 219 P.2d at 327. The development is approximately 7,100 acres and is home to both businesses and residences. According to Accipiter's Complaint, more than 1,160 homes were sold in the first ten months the Development was open. Complaint at p. 21. 45,000 people are expected to call the development "home" by the time build out is complete.

Under the myriad of agreements which govern the provision of communications services to the development, Vistancia Communications has virtually complete control over the provision of telecommunications services to the Vistancia community. It has the right to "[c]onstruct, lay, install, own, operate, lease, license, franchise, alienate, assign, modify, alter, supplement, inspect, maintain, repair, reconstruct, replace, remove, relocate, expand or otherwise service, all necessary or desirable Facilities of any type used to provide or make available any Communication Services within the Development." *Id.* at p. 3., Section 2.02. It appears, therefore, that Vistancia Communications is more than a mere easement holder; Vistancia Communications appears to exert pervasive and comprehensive control over the very facilities used to provide local exchange service. Vistancia Communications has an exclusive and perpetual right to contract with a communications service provider for the provision of service and for the installation, establishment and maintenance of facilities. CSER at p. 3, Section 2.01. Under the CSER, Section 2.08, Vistancia Communications designates what is to constitute a "Mandatory Communication Service" and who is to be a "Mandatory Communication Service Provider." **BEGIN PROPRIETARY INFORMATION** ******* **END PROPRIETARY INFORMATION.** It is entitled to significant monies under the agreements as a percentage of the revenues that Cox collects. It exercises control over the charges for Communication services and the adequacy of service within the Development. Under Section 2.08 of the CSER, if the Mandatory Communication services are not adequate or the charges for the services are not reasonable and just, then "the exclusivity within the Combined Easement with respect to each Mandatory Communication Service subject to such determination shall terminate," and Vistancia Communications has the right to grant access to another provider. Accipiter's allegations regarding Vistancia Communication's extensive involvement and control over the provision of telephone service to the public are so comprehensive that Accipiter's Complaint appears to state a claim that Vistancia Communications is a public service corporation furnishing "telephones service" within the meaning of Article 15, Section 2 of the Arizona Constitution, without a CC&N.

The provision of telephone service is not in this case "incidental" to the developer's other responsibilities. It is a full fledged business separate and apart from the business of the development

which the developer has a major stake in. This fact is reinforced by the developer's decision to create a separate entity, Vistancia Communications, to carry out these communications functions.

(2) A dedication to the public use

Dedication to the public use is shown by the "circumstances of each case," looking to "substance not form." Arizona Corporation Commission v. *Nicholson,* 108 Ariz. 317, 320, 497 p. 20 815, 818 (1972). In determining the question of whether we are dealing with a public utility, much enlightenment is gained if we know that the utility is dealing with the service of a commodity in which the public has generally been held to have an interest. *Van Dyke v. Geary,* 244 U.S. 39, 37 S.Ct. 483, 61 L.Ed. 973. To state that property has been devoted to public use is to state also that the public generally, in so far as it is feasible, has the right to enjoy service therefrom. *Serv-Yu,* 70 Ariz. 235, 239, 219 P.2d 324, 327. The test as to whether or not a person is a public utility is "whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public as a class or to any limited portion of it, as contra-distinguished from holding himself out as ready to serve only particular individuals." *Id.*

Vistancia Communications is holding itself out as engaged in the business of supplying phone service to the public, i.e., residents of the Vistancia development. Here Vistancia Communications has "dedicated itself to public utility service on behalf of a substantial part of the public and within a substantial area so as to make its business a matter of public concern, welfare and interest"; consequently it is a public utility and subject to regulation. Moreover, there can be no question that the easements granted to **and** strictly controlled by Vistancia Communications are dedicated to providing communications services, including telephone service, to the public .

(3) Articles of incorporation, authorization, and purposes.

The Articles of Organization simply indicate that the company is a limited liability company and is authorized to engage in any and all business authorized by law. As the Court in *Van Dyke v. Geary*, stated "It is what the corporation is doing rather than the purpose clause that determines whether the business has the element of public utility."

(4) Dealing with the service of a commodity in which the public has been generally held to have an interest.

Vistancia Communications is dealing with a commodity in which the public has a substantial interest, the provision of telephone service.

(5) Monopolizing or intending to monopolize the territory with a public service commodity.

Vistancia Communications controls the access of all telecommunications providers to the Vistancia development. The agreements between Vistancia Communications and CoxCom and the conduct of Vistancia Communications to-date evidence an intent to monopolize the territory with a public service commodity. A corporation , calculated to compete with public utilities and take away business from them, should be under like regulatory restriction if effective governmental supervision is to be maintained. *See e.g. Sew-Yu,* 70 Ariz. At 241-242, *citing Industrial Gas Co. v. PUC of Ohio,* 21 N.E.2d 166 (Ohio 1939).

(6) Acceptance of substantially all requests for service.

Vistancia Communications and its sub-designee, Cox Telcom, are the only providers of telephone service to the development and the residents have no choice but to take service from Vistancia Communication's sub-designee. Further, Vistancia Communication's sub-designee, Cox Telcom, presumably follows its tariff which requires it to provide service to all who meet the minimum requirements, just like any other phone company.

(7) Service under contracts and reserving the right to discriminate are not always controlling.

Vistancia Communications, through its sub-designee, Cox Telcom, provides service to end-users under Cox Telcom's tariffs, rather than special contracts. Cox Telcom then provides service to these customers using the exclusive right of way controlled by Vistancia Communications and under the terms and conditions mandated by Vistancia Communications. This factor strongly points to Vistancia Communications being a public service corporation.

(8) Actual or potential competition with other corporations whose business is clothed in the public interest.

Absent the exclusive easement arrangement, there would certainly be actual or potential competition with other corporations whose business is clothed in the public interest.

b. Count II of the Complaint: Accipiter Alleges that Shea Sunbelt Is Acting as a Public Service Corporation Under Arizona Law Without Having Secured a CC&N From the Commission.

In Count II of its Complaint, Accipiter alleges that Shea Sunbelt, as the alter ego of Vistancia Communications, is operating as a public service corporation without a CC&N in violation of A.R.S. Section 40-281, A.A.C. R14-2-502, or alternatively, A.A.C. R14-2-1103. In that the developer Shea Sunbelt is the sole member and manager of Vistancia Communications with exclusive authority to direct the operations and activities of Vistancia Communications, Staff believes that Accipiter appears to raise sufficient facts in Count II of the Complaint to state a cause of action against Shea for acting as a public service corporation without a CC&N.

c. The Commission Should Also Examine Whether Cox Telcom, Vistancia Communications and Shea Sunbelt Are Providing Telephone Service As A Joint Venture

Staff believes that the existence of a Joint Venture between Vistancia Communications and Cox Telcom to provide telecommunications services to the public should be examined in any proceeding on Accipiter's Complaint. Staff believes that the factual allegations of the Complaint support the existence of a Joint Venture in this instance. A Joint Venture is formed when two or more parties agree to pursue a particular enterprise in the hope of sharing a profit. *Arizona Public Service Co. v. Lamb,* 84 Ariz. 314, 317, 327 P.2d 998, 1000 (1958). Whether or not a Joint Venture exists is a question which must be resolved on the facts of each particular case. *Id.*

To constitute a valid Joint Venture under Arizona law, there must exist: (1) a contract; (2) a common purpose; (3) a community of interest; and (4) an equal right to control. *Sparks v. Republic,* 132 Ariz. 529 (1982).

With respect to Item 1 above, a contract of Joint Venture may be expressed or implied. *Ellingson v. Sloan,* 22 Ariz. App. 383, 527 P.2d 1100 (1975). For purposes of determining whether a contract of Joint Venture exists, the intent of the parties to associate themselves in a particular venture may be inferred from the parties' conduct. *Id.* While little formality is necessary to establish the

existence of a Joint Venture, in this instance, there are at least six contracts between the parties, governing the provision of telephone service to the Vistancia community. While these contracts do not expressly state that a Joint Venture is being created between CoxCom (and its affiliated ***Cox*** Arizona Telcom with regard to telephone service) and Vistancia Communications, the provisions of the contracts, and the parties' conduct together indicate that the parties intended to associate themselves in a particular venture.

The contracts and parties' conduct establish they are working toward a common purpose, the provision of communications services, including telephone service, to the Vistancia community.

The second prerequisite to creating a joint venture, is that the participants share a common purpose. A joint venture is in the nature of a partnership but is usually limited to a particular transaction or enterprise. *Muccilli v. Huff's Boys' Store, Inc.* 12 Ariz.App. 584, 588, 473 P.2d 786, 790 (1970). The relationship of the parties is generally limited to a single undertaking or to an ad hoc enterprise. An association must be of limited scope and duration in order for it to constitute a joint venture. The contracts between the parties and the parties' conduct firmly establish that the parties share the common purpose of providing telecommunications service to residents of the Vistancia development community.

The third prerequisite of a joint venture, a community of interest, is also established because there is clear evidence through the contracts and conduct of the parties of a community of interest. As to this element, some jurisdictions require a "joint proprietary interest" in the property used pursuant to the undertaking, while others require only a joint interest in the objects and purposes of the venture. Arizona falls into the latter category. Joint ownership of property is not necessary, Further, the contributions of the respective parties need not be equal or of the same character, but there must be a contribution by each co-venturer of something promotive of the enterprise. In this case, both parties have made significant contributions to the joint venture. Cox Telcom's affiliate has put in the facilities which Cox Telcom will be leasing to provide service. **BEGIN PROPRIETARY INFORMATION ************* END PROPRIETARY INFORMATION.**

The fourth prerequisite of a joint venture, an equal right of control, examines whether there is a right of mutual control over the subject matter of the venture, that is, the means by which the parties

intend to obtain their objectives. *Ellingson v. Sloan,* 22 Ariz.App. 383, 387, 527 P.2d 1100, 1104 (1975).

Some jurisdictions require that each of the parties have an equal voice in the manner of performance, while others allow a disparity in the amount of control allotted to the participants. In Arizona, it is sufficient if each joint venturer share, to some extent, in the control of the venture. It is sufficient that a venturer has some voice or right to be heard in the control and management of the venture. *Estate of Hernandez v. Flavio*, 187 **Ariz.** 506, 510, 930 P.2d 1309, 930 P.2d 1309, 1313 (1997). The Court in *Ellingson* also recognized:

> The requisite of equality in joint control does not render impossible the delegation of the duties of management to one of the participants in a joint venture. The rights of the parties with respect to the management and control of the enterprise may be fixed by agreement so as to effectively place control in the hands of one of the joint venturers, and, once having been fixed, may be changed by agreement. (Footnotes omitted). 46 Am.Jur.2d, Joint Ventures, s 42 at 61 (1969).

In this case, management and control appear to be shared in many respects. Cox Telcom runs the day to day operations; however Vistancia has a say in how the business is run, whether the rates charged are "reasonable" and whether quality service is being provided. It can replace ***Cox*** if it believes that the rates charged are not reasonable or inferior quality service is being provided. It has a say in what facilities are put in place. In summary, both entities share control of the venture.

Some cases also add in a fifth factor in proving the existence of a joint venture. This fifth factor is an agreement, express or implied, for the sharing of profits, although the mode in participating in the fruits of the undertaking may be determined by the parties. *See Estate of Hernandez, **supra.*** Other Arizona cases do not include this fifth factor. ***See Sparks,*** supra., *Murry v. Western American Mort. Co.* 124 Ariz. 387 (App. 1979); *West v. Soto,* 85 Ariz. 255 (1959). Hernandez holds that profits are not required to form a "social joint venture". *Hernandez* also speculates that profit sharing is required for a business joint venture. But *Hernandez* did not involve a business joint venture, and it did not overrule the prior cases which did not require profit sharing. These two lines of cases have never been reconciled. Arizona law therefore remains unclear on this point.

To the extent the Commission wants to consider this fifth factor, the factor is flexible. Whether the sharing of losses must also exist is the subject of considerable controversy. When a sharing of losses is deemed required, the term "loss" does not necessarily mean actual monetary loss suffered in the course of the enterprise, but can refer simply to an expenditure of time or of money for out-of-pocket expenses.

In this instance, the Joint Venture has put in place a private easement for telecommunications service which restricts access to telecommunications providers other than Cox Arizona Telcom. Here the mode of "participating in the fruits of the undertaking was determined by the parties" through their agreement. Vistancia is entitled to monies or fees calculated as a percentage of revenues. The arrangement is tantamount to a sharing of profits because the venture cannot help but be profitable since the arrangements between the parties effectively precludes any provider, other than Vistancia's designee Cox Arizona Telcom, from providing telephone service to the development.

While some courts have found that a sharing of revenues was not a sharing of profits, others have found such arrangements to be acceptable and to contemplate a sharing of profits. In *UST Corporation v. General Road Trucking* **Corp.** 783 A.2d 931 (2001), in what was a joint venture, the proceeds or revenues of the joint venture were shared between the parties to the venture. Other cases have recognized joint ventures with revenue sharing provisions. A good example of such a joint venture is *Waterman v. Rabinovitz,* 161 Ariz. 511, 779 P.2d 826 (1989). In *Waterman,* the parties were attorneys who agreed to divide a contingency fee 75%/25%. This is a division of revenue – the same as in this case.

Vistancia Communications will likely contend that its participation is limited to revenue-sharing, not profit-sharing, and that it is thus not part of a joint venture. Any such argument would rely on a narrow definition of profit. The Commission, like some courts, need not adopt the narrow definition of profit for these purposes. Indeed, Vistancia Communication's revenue sharing rights qualify under a number of definitions of profit. For example, the first definition of profit in Webster's Encyclopedic Unabridged Dictionary of the English Language (rev. ed. 1996) is "pecuniary gain resulting from the employment of capital in any transaction." (Definition 1A) Vistancia Communications has likely invested capital in its own operations, and it certainly has contributed

capital to CoxCom. And Vistancia Communication's revenue sharing proceeds give it "pecuniary gain". Thus, Vistancia Communications is receiving profit under this definition. Another definition is "returns, proceeds, or revenue, as from property or investments". *Id.* at definition 1C. Vistancia Communications has received a portion of the revenue of Cox Telcom and its affiliates.

Yet another definition is "advantage, benefit, gain" ***Id.*** at definition 3. Vistancia Communication's revenue sharing proceeds give it an "advantage, benefit, [or] gain". Vistancia Communications receives profit under each of these definitions. Only under the narrowest definition does Vistancia Communications not qualify. Vistancia Communications is part of a complex and nearly unprecedented scheme to restrict competition and consumer choice to the detriment of the public interest. The Commission should therefore reject the narrow definition of profit for the purposes of this case and instead adopt one of the broader definitions which would not allow the parties to evade the definition of a "joint venture" simply by calling the sharing of profits "revenue sharing" under their agreements. The allegations of the Complaint, if true, could support a finding that Vistancia is part of a joint venture with Cox Telcom and its affiliates.

This case also contains elements of loss or risk sharing as well given the PROPRIETARY made by Vistancia Communications to CoxCom.

a. <u>The Joint Venture is Operating as A Public Service Corporation</u>

There can be no doubt that to the extent a Joint Venture exists, it is operating as a public service corporation under Arizona law. Clearly, under the *Sew-Yu* criteria, the Joint Venture between Cox Telcom and Vistancia is "clothed with a public interest".

(1) What the corporation actually does

The Joint Venture between Cox Telcom and Vistancia provides telephone service to the public, which in this case includes all residents and business located in the Vistancia development in Peoria. As Accipiter notes in its Complaint, at build out, the Development will comprise some 17, 000 homes with 45,000 residents. Accipiter Complaint at p. 33.

...

...

...

(2) A dedication to the public use

There is no question that the Joint Venture is dealing with the service of a commodity in which the public has generally been held to have an interest. The Joint Venture is holding itself out as engaged in the business of supplying phone service to the public, approximately 45,000 residents.

(3) Articles of incorporation, authorization and purpose

While there is no express recognition of the Joint Venture in any of the agreements between the parties, it can be implied by the terms of the agreements and the parties' conduct.

(4) Dealing with the service of a commodity in which the public has been generally held to have an interest.

The Joint Venture is providing telecommunications services to the public for profit, a commodity in which the public has been generally held to have a substantial interest.

(5) **Monopolizing or intending to monopolize the territory with a public service commodity.**

The Joint Venture has complete control over any access by another telephone provider. The agreements between Vistancia and CoxCom with respect to the provision of telephone service all evidence an intent to monopolize the provision of telephone service to the Vistancia development. A corporation, calculated to compete with public utilities and take away business from them, should be under like regulatory restriction if effective governmental supervision is to be maintained.

(6) **Acceptance of substantially all requests for service.**

The Joint Venture is the only provider of telephone service to the development and the residents have no choice but to take service from the Joint Venture.

(7) Service under contracts and reserving the right to discriminate are not always controlling.

Vistancia Communications, through its sub-designee, Cox Telcom, provides service to end-users under Cox Telcom's tariffs, rather than special contracts. Cox Telcom then provides service to these customers using the exclusive right of way controlled by Vistancia Communications and under the terms and conditions mandated by Vistancia Communications. This factor strongly points to the Joint Venture being a public service corporation.

(8) Actual or potential competition with other corporations whose business is clothed in the public interest.

Absent the exclusive easement arrangement, there would certainly be actual or potential competition with other corporations whose business is clothed in the public interest.

d. The Commission Should Also Examine Whether The Conduct of the Parties Falls Within the Purview of *Woods* Which Recognizes that the Commission's Authority Necessarily Extends To Matters Which Are Necessary For It To Be Able to Effectively Carry out its Constitutional responsibilities.

Under the Arizona Constitution, the Commission's powers over public service corporations are broad and far-reaching under Article 15, Section 3 of the Arizona Constitution and must necessarily encompass transactions between the public service corporation and other entities that pose a threat to the Commission's ability to effectively regulate and protect the public. *See* Article XV, Section 3 of the Arizona Constitution.

In *Arizona Corp. Comm'n v. State* ex *rel. Woods,* 171 Ariz. 286, 830 P.2d 807 (1992), the Supreme Court recognized that the Commission's authority had to necessarily extend beyond a strict interpretation of the "ratemaking" function if the Commission was to be able to effectively carry out its Constitutional responsibilities. The Supreme Court stated in part: "[w]hatever the historical justification for looking at more than setting a fair return on a predetermined value, current events in this state and others prove the wisdom and necessity of a broader view of what is involved in ratemaking." *Id* at p. 296. The Court also recognized that "the transactions between public service corporations and others (in that case their affiliates) could have disastrous consequences for the economic viability of the entire enterprise, and that such misfortunes are visited not only on the stockholders of the company but the ratepayers of the state." *Id.* The Court also stated:

> The Commission was not designed to protect public service corporations and their management but, rather, was established to protect our citizens from the results of speculation, mismanagement, and abuse of power. To accomplish those objectives, the Commission must have the power to obtain information about, and take action to prevent, unwise management or even mismanagement and to forestall its consequences in inter-company transactions significantly affecting a public service corporation's structure or capitalization. It would subvert the intent of the framers to limit the Commission's ratemaking powers

so that it could do no more than raise utility rates to cure the damage from inter-company transactions. ***Id.***

The factual backdrop of *Woods* was a series of reorganizations by public utilities that led to several of these entities facing serious financial problems and in at least one case near-insolvency. The ***Woods*** Court recognized that the public service corporation's transactions with affiliates was having a profound effect and in many instances undermining the Commission's ability to carry out its most important Constitutional responsibilities, i.e., protecting our citizens from the results of speculation, mismanagement and abuse of power. This case is not unlike ***Woods*** in many ways. Again, we have a factual situation where the public service corporation which the Commission regulates is entering into transactions or agreements with another entity and those agreements are indermining the Commission's ability to protect citizens from monopolization of the telecommunications market in developments in Arizona and interference with the provisions of the Commission's orders and rules.

2. The Remaining Counts

a. Count III of the Complaint: Accipiter Seeks Reclassification of The Services Provided by Cox as Non-Competitive.

Under Count III of the Complaint, Accipiter alleges that Cox's services within the development should be reclassified as non-competitive. Paras. 62, 63 and 67 of Accipiter's Complaint allege in relevant part:

> 62. The Commission approved the application of Cox Arizona Telcom for a statewide CC&N in Decision 60285, and ruled that the intrastate telecommunications services proposed by Cox Arizona Telcom were competitive within Arizona. Decision 60285 at 4. In making its ruling, the Commission found that there were several incumbent providers of local exchange and toll services in the service territory requested by Cox Arizona Telcom, and at least nine other entities have been authorized to provide competitive LEC and toll services in all or portions of that territory. Id. at 2.
>
> 63. However, the conditions which led Utilities Division Staff and the Commission to conclude that Cox Arizona Telcom's intrastate telecommunications services were competitive in decision 60285 do not exist within the Development. Cox Arizona Telcom is the only provider of wireline facilities based local exchange service within the Development. .....
>
> * * * * *
>
> 64. Cox Arizona Telcom was granted pricing flexibility in its local rates because its services were found to be competitive in Decision 60285. However, where there is no underlying local exchange service provided by an incumbent local carrier, there can be no *competitive* local exchange service. .....

Cox Telcom filed a Motion to Dismiss this Count as well as the remaining Counts of Accipiter's Complaint. In Arizona, motions to dismiss for failure to state a claim are not favored. *See State ex vel. Corbin v. Pickrell,* 136 Ariz. 589, 594, 667 P.2d 1304, 1309 (1983). When a complaint is the target of a rule 12(b)(6) motion, the court must assume the truth of all of the complaint's material allegations, accord the plaintiffs the benefit of all inferences which the complaint can reasonably support, and deny the motion unless certain that plaintiffs can prove no set of facts which will entitle them to relief upon their state claims. *Gatecliff v. Great Republic Life Ins.,* 154 Ariz. 502, 508, 744 P.2d 29, 35 (App. 1987).

Cox Telcom argues in its Motion to Dismiss that Decision No. 60285 contemplated instances where Cox Telcom would be the only provider in a specific area by including the following provision:

> (g) in areas where Cox is the sole provider of local exchange service facilities, Cox provide customers with access to alternative providers of service pursuant to the provisions of A.A.C. R14-2-1112 and any subsequent rules adopted by the Commission on interconnection and unbundling.

Citing Decision No. 60285 at 3, para. 18(g). Cox Telcom states that it is prepared to meet this obligation and that the property owner is not denying Accipiter access but that Accipiter simply does not like the terms of access.

R14-2-1108(H) of the Commission's Competitive Classification Rules provides that:

> Any telecommunications service classified by the Commission as competitive may subsequently be reclassified as noncompetitive if the Commission determines that reclassification would protect the public interest. Notice and hearing would be required prior to any reclassification. The burden of proof would be on the party seeking reclassification.

Staff believes that Accipiter has raised sufficient facts to present a cause of action under this Count such that the Commission should proceed to examine whether Cox Telcom's provision of service in the development should be reclassified as monopoly services. In the event that Cox's services are ultimately reclassified, then Cox may need to obtain a CC&N to provide the services as a monopoly provider and its rates would have to be set as monopoly rates.

b. Count IV of the Complaint: Accipiter Seeks to Revoke the Antitrust Exemption of A.R.S. Section 40-286 For Cox, Vistancia and Shea Sunbelt.

Under Count IV of the Complaint, Accipiter asks the Commission to find that neither Cox Telcom, Vistancia Communications or Shea Sunbelt are entitled to antitrust exemption of A.R.S. Section 40-286. Cox Telcom argues that the relief sought under Count IV is illusory and that Cox Telcom already does not possess an antitrust exemption under the express language of A.R.S. Section 40-286 which provides:

> The provisions of title 44, chapter 10, article 1, shall not apply to any conduct or activity of a public service corporation holding a certificate of public convenience and necessity granted pursuant to this article, which conduct or activity is approved by a statute of this state or of the United States or by the corporation commission or an administrative agency of this state or of the United States having jurisdiction of the subject matter. This section does not apply to the provision of competitive electric generation service or other services or to the provision of any competitive telecommunications service.

Staff agrees with Cox Telcom, that currently neither it or Vistancia Communications/Shea Sunbelt possess an exemption from the Antitrust Laws in that the Commission has declared the services provided by Cox Telcom to be competitive. Staff understands Accipiter's concern to be that f Cox's services are reclassified as monopoly services, they should not obtain the benefit of the intitrust exemption traditionally available to monopoly providers regulated by the Commission.

However, Staff believes that in reclassifying the services the Commission would not be saying n any way that these markets should not be competitive; it would merely be reclassifying the services of a particular provider, to treat them as monopoly services, in a particular case given the circumstances presented. In Staff's opinion, the only reason the services are not competitive is because of the complex scheme created by the parties. The parties should not benefit from this by having the antitrust exemption reinstated and this is certainly not the intent of the Staff.

c. Count V of the Complaint: Accipiter Alleges that Shea Sunbelt, Vistancia Communications and Cox Telcom are Interfering with Accipiter's Carrier-of-Last Resort Obligation in Violation of A.R.S. Section 40-281 and the Public Interest

In Count V of its Complaint, Accipiter alleges that Shea Sunbelt, Vistancia Communications ind CoxCom are interfering with its Carrier-of-Last Resort obligations because it has been illegally denied access to the public utility right-of-way within the Development. Thus, if a new customer in

the Development requests service from Accipiter, Accipiter cannot provide service to that customer. If Cox Telcom terminates service to a customer within the Development, Accipiter cannot provide service to that customer. Accipiter relies upon Arizona Revised Statutes Section **40-281(B):**

> If a public service corporation, in constructing or extending its line, plant or system, interferes or is about to interfere with the operation of the line, plant or system of any other public service corporation already constructed, the commission, on complaint of the corporation claiming to be injuriously affected, may, after hearing, make an order and prescribe terms and conditions for the location of lines, plants or systems affected as it deems just and reasonable.

Cox Telcom argues that this Count should be dismissed because A.R.S. Section **40-281.B** does not provide authority to the Commission to grant the relief requested and because parties indispensable to the resolution of the claim have not been joined. Cox Telcom Motion at pps. **5-6.** Moreover, Cox Telcom argues that the Commission cannot join all indispensable parties because it lacks jurisdiction over them.

Staff believes that the Accipiter Complaint alleges facts sufficient to present a cause of action against Cox Telcom, Vistancia Communications and Shea Sunbelt. Staff does not believe that the cause of action fails because CoxCom and the City of Peoria are not parties. The Commission is only concerned with the offensive nature of certain contract provisions as applied to telecommunications service and telecommunications service providers. Further as Accipiter notes in its Reply to Cox Telcom's Motion to Dismiss, A.R.S. **40-246(B)** recognizes that joinder of all parties may not be possible in complaint matters:

> All matters upon which complaint may be founded may be joined in one hearing, and a complaint is not defective for misjoinder or nonjoinder of parties or causes, either before the commission, or on review by the courts. The commission need not dismiss a complaint because of the absence of direct damage to the complainant.

Moreover, the City of Peoria and CoxCom are free to intervene in this case if they feel that their interests are affected.

If the Commission should find as Cox Telcom argues that **40-281** does not provide a basis for relief, Staff believes that A.R.S. **40-321** would provide a basis. Staff also believes that the entities named in the Complaint are interfering with and precluding enforcement of an Order entered by the

Commission which allows the incumbent Accipiter to provide service throughout the area in which Vistancia is located.

d. Count VI of the Complaint: Accipiter Alleges that the Developer failed to Provide Accipiter With a No-Cost Right-of-way in Violation of A.A.C. R14-2-506(E)(2)(b):

In Count VI of its Complaint, Accipiter alleges that the developer violated the Commission's rules by not providing Accipiter with a no-cost right-of-way. A.A.C. R14-2-506(E)(2)(b) states that '[r]ights-of-way and easements suitable to the utility must be furnished by the developer at no cost to the utility and in reasonable time to meet service requirements.

This issue is closely related to the discussion above pertaining to *Woods,* under Count I of Accipiter's Complaint. In order for the Commission to carry out its responsibilities under Article 15, Section 3, it must at times impose requirements for others to follow in their dealings with the public utility to ensure that the public utility can carry out its responsibilities under Arizona law and Commission rules for the public good.

For instance, in the *Woods* case discussed ***supra.,*** the Commission adopted affiliated transaction rules which allowed the Commission to review and approve a Class A utility's transactions with unregulated affiliates to the extent they might adversely affect the provision of utility service to the public.

Such rules are adopted by the Commission to ensure that it can carry out its responsibilities to ensure that utility service can be provided to end users in a safe and efficient manner and to ensure that other policies of the FCC and Commission can be carried out such as open access to ensure that customers have a choice in their telecommunications providers and have options in the event they are dissatisfied with the service they are receiving from their current provider.

If third parties who are closely involved in the utility's ability to provide service are allowed to take steps to stymie, interfere or undermine the public service corporation's ability to comply with state law and Commission rules, the Commission would be unable to carry out its responsibilities under Article XV, Section 3.

Staff believes that when the allegations of the complaint are admitted, a cause of action is presented under Commission rules. Without question this is the most troubling part of the arrangement between CoxCom, Cox Telcom, Shea Sunbelt and Vistancia Communications. The easement controlled by Vistancia Communications and the Joint Venture impose prohibitive access fees of $1 Million to gain entrance to both phases of the development and is antithetical to a competitive telecommunications marketplace, the Telecommunications Act of 1996 and the policies of this Commission to promote competition in all telecommunications markets in Arizona. The discriminatory easement arrangement for communications providers attempts to turn what are labeled as "non-exclusive agreements" into exclusive arrangements for the provision of telephone service between ***Cox*** Telcom and Vistancia Communications.

In addition to state law, several provisions of the Federal Act also come into play which govern arrangements of this nature when the entity(s) involved are telecommunications providers and Cox Telcom's and Vistancia Communication's violation of these provisions should be the subject of examination in this proceeding as well.

Where public service corporations are involved, the exclusive easement arrangements also violate several provisions of the federal law including 47 U.S.C. Sections 224 and 251(b)(4). Section 251(b)(4) of the Telecommunications Act requires all local exchange carriers ("LECs") to "afford access to the poles, ducts, conduits, and rights-of-way... to competing providers of telecommunications services on rates, terms, and conditions that are consistent with Section 224 of this Title." As public service corporations under Arizona law, Cox Telcom, Vistancia Communications and the Joint Venture would all be subject to these provisions.

Moreover 47 U.S.C. Section 224 governs the rates, terms and conditions under which access must be provided. Specifically, section 224(f)(1) requires that "a utility shall provide...nondiscriminatory access to any pole, duct, conduit or right-of-way owned or controlled by it." The FCC has explained that the access obligations of 224(f)(1) apply "when as a matter of state law, the utility owns or controls the right-of –way to the extent necessary to permit such access. See First Report and Order at para. 1179. Moreover, Section 224 deals with all utilities whereas Section 251(b)(4) concerns only telecommunications carriers. Section 224 allows CLECs access to the

physical networks and rights-of-way of all other utilities including those belonging to electric companies, gas companies, water companies and the like. *See US West Communications v. Hamilton,* 224 F.3d 1049 (9th Cir. 2000).

In addition to the Commission rules and orders discussed above, State and Federal law, the FCC's order in FCC No. 00-366 (rel. October 25, 2000) precludes this type of exclusive access arrangement with respect to other multi-tenant locations.

e. Count VII of the Complaint: Accipiter Alleges that Cox Arizona Telcom's Execution of the NELA- CMA, the NELA-PAA, the CMA and the PAA Violates Cox Arizona Telcom's Tariffs and the Equal Access Requirement of A.A.C. R14-2-1111

In Count VII of its Complaint, Accipiter claims that Vistancia Communications' exclusionary power to select Communication Service Providers extends to long distance providers as well. Accipiter further argues that by collaborating in the anticompetitive scheme described in the Complaint, and executing the NELA-CMA, NELA-PAA, CMA and PAA, Cox Arizona Telcom has knowingly and intentionally violated the intraLATA equal access requirement set forth in A.A.C. R14-2-1111.

Cox Telcom argues that the Commission does not have jurisdiction to consider this claim. Cox Telcom argues that Accipiter's claim would improperly require the Commission to interpret the legal effect of the Agreements in order to determine that they preclude Cox Telcom to provide 2-PIC equal access – which they do not and could not. Staff agrees with Accipiter that Cox Telcom's interpretation of the case law on this point is misplaced. See Accipiter Response at p. 13. The Courts' holdings in *General Cable Corp. v. Citizens Utility Company,* 27 Ariz. App. 381, 555 P.2d 350, (1976) and *Trico Electric Coop v. Ralston,* 67 Ariz. 358, 196 .2d 470 (1948) were actually very narrow and went to issues that were not within the particular expertise of the Commission. This is not the case here. If Cox Telcom's position was accepted, the Commission's authority would be toothless; it would be rendered powerless to enforce any violation of its rules and enabling statutes if contained in a contract. This is an absurd proposition at best.

By citing *General Cable* and *Trico,* Cox Telcom also suggests that the Commission exceeds its authority and usurps the role of the judiciary if it interprets a contract. But the separation of

Dowers is not violated when an administrative body finds facts or makes conclusions of law.[2] *See Batty v. Arizona State Dental Board,* 57 Ariz. 239,246 (1941). *Batty* held that "the power to hear and determine whether a certain state of facts which requires application of a law exists is committed to an administrative or executive officer, although the particular power may be identical with the one which is also exercised by a court, it is, strictly speaking, not "judicial" but "quasi-judicial power" and therefore does not violate *Art.* III. Therefore, an administrative agency may adjudicate contractual disputes when performing duties assigned to it by law. *See J.W. Hancock Enterprises, Inc. v. Arizona State Registrar of Contractors,* 142 Ariz. 400, 406-407 (App. 1984)(affirming agency adjudication of contract dispute, noting that "the construction and interpretation of contracts is nothing more than a determination of the facts...and applying the law.")

An agency adjudication only violates Art. III when there has been an "usurpation of powers" under a four part test: 1) the essential nature of the power; 2) the degree of control; 3) the nature of the objective; and 4) the practical result. Id. at 405. The Arizona Supreme Court has expressly adopted the *Hancock* test. *State ex rel. Woods v. Block.* 189 Ariz. 269, 276-77 (1997)(adopting the *Yancock* test); *Citizens Clean Elections Comm'n v. Myers,* 196 Ariz. 516, 1 P.3d 706 (2000).

As in *Hancock,* the 1) essential nature of the power is judicial or quasi-judicial, but 2) the legislature does not retain coercive power over the judiciary because judicial review is available; 3) the objective – resolution of a dispute concerning service areas, competitive conduct, and violation of various Commission rules and orders – is legitimately regulatory and related to the agency's purpose; and 4) the practical result and public policy prong is satisfied because the Commission is the department of government with the most expertise on the subject of telecommunications regulation. *See Hancock* 189 Ariz. At 405-406; *see also Cactus Wren Partners v. Arizona Department of Building and Fire Safety,* 177 Ariz. 559, 562-63 (App. 1993)(applying *Hancock* test to find the Department could adjudicate a dispute over fees charged mobile home residents and ordering refund.)

[2] Article III provides that the government is "divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in the Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers belonging to either of the others." The exception clearly refers to the Commission. The Legislature has the power to expand the Commission's power under Art. XV Section 6. It did so by giving the Commission broad complaint powers under A.R.S. Section 40-246. Because this expansion of powers is authorized by the Constitution in Article XV Section 6, separation of powers principles do not even apply. But since this case clearly satisfies the test in *J.W. Hancock,* there is no need to explore this concept further.

Cox Telcom heavily relies on *Trico* and *General Cabl.e* Unfortunately for Cox Telcom, the relevant language of the cases has been expressly dismissed by the courts as dicta. *J.W. Hancock,* 142 Ariz. At 404-408 (holding that "in a practical sense the language in both cases is dicta, as it pertains to the construction of a contract where its terms are disputed, since neither case involved a dispute as to the meaning of the contract")(emphasis added); *see also Cactus Wren Partners,* 177 Ariz. at 562-64. Instead of applying a formalistic and anachronistic "is it contract interpretation test?", courts now apply the *Hancock* test. *Id.*

Moreover, even if the language from *Trico* and *General Cable* was not outmoded dicta, the cases are clearly distinguishable. *Trico* dealt with an option agreement that implicated the Commission's statutory power to approve sales of "necessary or useful" equipment by utilities and not the Commission's complaint authority. In *General Cable,* the Commission deferred to the courts – once this occurred the court could hardly employ primary jurisdiction to defer back to the Commission again; such an action would treat the case like a tennis ball careening back and forth between the Commission and the courts. In this case, the dispute is not pending in any court, and is instead properly before the Commission. For these reasons, the Commission has expressly rejected the argument Cox Telcom raises here in Decision Nos. 61870 and 62339.

Moreover, Cox Telcom's objection is limited to only some of the counts of the Complaint. As it implicitly acknowledges, the remaining claims are properly before the Commission. It makes little sense to carve out some claims when they are clearly interrelated with other claims properly before the tribunal. For this reason, the law has long recognized the concept of "Pendant Jurisdiction". Even if the Commission's complaint authority did not extend to the claims to which Cox Telcom objects, the Commission could therefore exercise pendant jurisdiction.

Staff disagrees with Cox Telcom and believes that Accipiter has alleged a cause of action under the Commission's rules. Staff also believes that the facts presented by Accipiter also raise the issue of whether Cox Telcom is violating the provisions of Decision No. 60285 granting Cox Telcom a CC&N.

f. Count VIII of the Complaint: Accipiter Alleges that the Exclusionary Scheme Devised by Shea Sunbelt, Vistancia and Cox Should be Prohibited

Under Count VIII of its Complaint, Accipiter alleges that the exclusionary scheme devised by Shea Sunbelt, Vistancia Communications and Cox Telcom is designed to prevent competition and should be prohibited. Cox Telcom argues that Count VIII and the related request for relief fail because it requires the Commission to interpret the legal significance and effect of contracts and because it seeks to have the Commission invalidate contracts between entities that have not been joined as parties. Cox Motion at pps. 8-9.

Staff disagrees with Cox Telcom and believes that when the material allegations of this Count are assumed or admitted, a cause of action exists. The Commission has the authority under A.R.S. 40-321 to determine the adequacy of service rendered by any public service corporation. See also Article XV, Section 3. The scheme devised by the parties is an unreasonable practice under State law and the Commission should enter an Order prohibiting it

A.R.S. Section 40-321 provides the Commission with the following authority:

> When the commission finds that the equipment, appliances, facilities or service of any public service corporation, or the methods of manufacture, distribution, transmission, storage or supply employed by it are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine what is just, reasonable, safe, proper, adequate or sufficient, and shall enforce its determination by order or regulation.

In this case, there is no question that the limited access arrangement is an unjust, unreasonable, unsafe, improper, inadequate and insufficient scheme which is not in the public interest and violates Commission rules, State law, and Federal law. The Commission has the authority under A.R.S. Section 40-321 to void this arrangement as against public policy.

g. Count IX of the Complaint: Accipiter Alleges that Cox Telcom Should be Required to Provide Non-Discriminatory Interconnection to its Network

In Decision 60285, the Commission ordered that "in areas where Cox Arizona Telcom is the sole provider of local exchange service facilities, it must provide customers with access to alternative providers of service pursuant to the provisions of A.A.C. R14-2-1112 and any subsequent rules

adopted by the Commission on interconnection and unbundling. Decision 60285 p. 3, Finding of Fact 18(g).

A.A.C. R14-2-1112 provides in relevant part:

> All local exchange carriers must provide appropriate interconnection arrangements with other telecommunications companies at reasonable prices and under reasonable terms and conditions that do not discriminate against or in favor of any provider, including the local exchange carrier. Appropriate interconnection arrangements shall provide access on an unbundled, non-discriminatory basis to physical, administrative, and database network components.

Cox argues that Count IX is simply a red herring and that there is no actual relief that the Commission needs to provide in response to the allegations in Count IX. Cox Telcom states that it is already obligated to provide interconnection and to allow the resale of its services and that there is no allegation that the Agreement could preclude Cox Arizona Telcom from interconnecting with Accipiter or could prevent Accipiter from reselling Cox Arizona Telcom's services; and that the Agreements do not impose any such restriction. Therefore, Cox Telcom argues that Count IX fails to state a claim upon which relief can be granted against Cox Telcom.

For the reasons stated in the discussion of the previous count, Staff disagrees with Cox. When the allegations of the Complaint are admitted, a cause of action is stated under the Commission's rules. In addition, the facts of Count IX raise a cause of action against Cox for possible violation of the conditions of its CC&N. Count IX of the Accipiter Complaint should not be dismissed.

In being part of this scheme, Cox Arizona Telcom is violating provisions of its CC&N which the Commission granted in Decision No. 60285. Under its CC&N, Cox Telcom is required to provide access to its network to competitive carriers. It is also required to comply with other Commission rules and regulations. Yet, because of the exclusive easement scheme Cox Telcom is a part of, Cox Telcom cannot fulfill its obligations as mandated by Commission order and rule.

R14-2-1106(B) provides that "Every telecommunications company obtaining a Certificate of Convenience and Necessity under this Article shall obtain certification subject to the following conditions:

Original and 13 copies of the foregoing filed this 20th day of May, 2005, with:

Docket Control
Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007

Copy of the foregoing mailed this 20th day of May, 2005, to:

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(1) The telecommunications company shall comply with all Commission rules, orders, and other requirements relevant to the provision of intrastate telecommunications service.

* * *

(2) Failure by a telecommunications company to comply with any of the above conditions may result in rescission of its Certificate of Convenience and Necessity.

The Commission should examine in the context of this case appropriate penalties to be messed on Cox Telcom for violating Commission rules and orders by its knowing and voluntary participation in this scheme.

IV. Staff Recommendations On Further Action

Staff recommends that the Commission schedule a proceeding on an expedited basis to address the allegations raised by Accipiter in its Complaint. The additional issues raised by Staff herein should be subject to examination in the context of that proceeding.

V. Conclusion

Accipiter's Complaint raises multiple causes of action under the Commission rules and enabling statutes, as well as Federal law, against Cox Telcom, Vistancia Communications, Shea Sunbelt and the Joint Venture between Cox Telcom and Vistancia Communications. Staff believes that the causes of action presented in Accipiter's Complaint, as well as the additional issues raised here, be addressed on an expedited basis. The Commission also has the option of issuing an Order to Show Cause at this time, if it so chooses.

RESPECTFULLY SUBMITTED this 20th day of May, 2005.

ARIZONA CORPORATION COMMISSION
STAFF

By _____
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AFF-30

DiNunzio, Mark (CCI-Phoenix)

From: Arthurs, Tisha (CCI-Phoenix)
Sent: Wednesday, July 16, 2003 3 32 PM
To: DiNunzio, Mark (CCI-Phoenix), Kelley, Mary (CCI-Phoenix)
Subject: RE Vistancia Contract

Mark,
The developer is the one who pushed with the City of Peoria for the private easements in a public community. The terms of the easements were set up for us. They paid us a $3 million dollar capital contribution and wanted to insure that they would get at least some of that money back through the revenue share program. The revenue share terms are set high enough that they will really have to perform in order to recoup any of their capital contribution. If the RGU's were shared between multiple providers they would never reach the penetration expectations that we set for them. This sort of agreement has been successfully executed in another location (state). I can get you in touch with their guru if you want to dialog it further.

Best regards,
Tisha Arthurs
Cox Communications
Sr Account Executive
(623)322-7857

-----Original Message-----
From: DiNunzio, Mark (CCI-Phoenix)
Sent: Wednesday, July 16, 2003 3:07 PM
To: Kelley, Mary (CCI-Phoenix), Arthurs, Tisha (CCI-Phoenix)
Subject: Vistancia Contract

Did either of you have any problems with the way the developer negotiated use of the easements for Vistancia? My understanding is that Qwest and another carrier are fighting the way the developer wanted to negotiate the use of the easement I know we are the preferred provider for this area but just wanted to know if we had a problem with this too or were able to accept it since we landed the contract If we did have a problem with it, please let me know as it could set a precedent for other areas we may want to serve. Thanks.

Mark A. DiNunzio
Manager, Regulatory Affairs
Office - 623-322-8006
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Cell - 602-741-3740
mark.dinunzio@cox.com

CERTIFICATE OF SERVICE

I, Patrick Sherrill, hereby certify that on June 20, 2012 I sent by first class United States mail copies of the foregoing Reply to the following parties:

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/s/ Patrick Sherrill
Patrick Sherrill